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PRINCIPLES
OF THE
LAW OF CONTRACT

BY

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PREFACE OF AMERICAN EDITOR.

In the preparation of this book for an American Edition regard has been had more especially to the needs of the student than to those of the practitioner, and the author's plan of giving but a small number of references has been followed except in those cases where the courts of the different States disagree in their views upon any question.

The body of the text has been changed by leaving out those portions based upon late English statutes, and in a few instances by substituting the Common Law rules instead of those omitted, and by a few additions which seemed to be necessary. Quite a number of American cases have been added to the marginal references to enable the student the more readily to verify the statement of the text.

Where the rule as given in the text is denied by any or all of the American courts, this dissent has been expressed in the foot notes, and in two or three instances it appeared to be necessary to give the facts of cases cited where the author seemed to use them to support conclusions hardly warranted by the decisions.

This volume has been prepared for the purpose of giving to the American student an introductory work

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on Contracts, which, in the judgment of the editor, based upon an experience of several years as a teacher of that branch of the law, is better suited to the needs of students than any other work which he has used or examined.

BLOOMINGTON, ILL., March 1, 1880.

AUTHOR'S PREFACE.

This book is an attempt to draw such an outline of the principles of the law of Contract as may be useful to students, and, perhaps, convenient to those who are engaged in the teaching of law. To some of those who are so engaged it has seemed that there is need of an elementary treatise which should deal with the subject of Contract in its entirety; and the existence of such a need is my excuse for the production of the present work.

The main object with which I have set out has been to delineate the general principles which govern the contractual relation from its beginning to its end. I have tried to show how a contract is made, what is needed to make it binding, what its effect is, how its terms are interpreted, and how it is discharged and comes to an end.

In thus sketching the history of a contract, I have striven to maintain a due proportion in my treatment of the various parts of the subject, and to avoid entering into the detail of the special kinds of contract. The history and antiquities of the subject have, of necessity, been dealt with only so far as was absolutely necessary to explain existing rules, and I have placed in Appendices what I have to say on two matters the

treatment of which seemed to be unavoidable and yet out of place in any part of a merely general outline.

One of these is the "contract implied in law," or quasi-contract. The effect of this legal relation has been fully explained by Mr. Leake (part I, c. I, s. 2), and it seemed to be only necessary to point out the general character of the obligation which it creates, and to sketch the history of the mode in which, for the convenience of pleading, it figured for a while in the outward form of contract.

The other subject is the special contract of Agency: this, too, I regarded as a matter alien to a general discussion of the principles of contract, but the constant recurrence of the relation of Principal and Agent made it needful to give a brief outline of the chief rules regarding Agency.

On one or two points, interesting in themselves, or open to discussion, I have dwelt at a length disproportionate perhaps to my general plan. The somewhat slender authority for some of the often-quoted rules relating to past consideration, the various effects of innocent misrepresentation, the questionable validity of a bare waiver of contractual rights, are points to which I have called the attention of the reader. The intricate subject of the discharge of contract by breach, and its effects, together with the kindred subject of conditional and independent promises, would seem to need a fuller analysis than it has yet received in the books on Contract. Conditions are usually dealt with in connection with the promise when made, whereas their full effect can only be ascertained when they are regarded as affecting the promise when broken.

Another object which I have striven to attain is that of inducing the student to refer to the cases cited in illustration of the rules laid down, and to form for himself a clear notion of the law as it has been expounded from the Bench. The law of contract so far as its general principles go has been happily free from legislative interference: it is the product of the vigorous common sense of English Judges; and there can hardly be a healthier mental exercise than to watch the mode in which a judicial mind of a high order applies legal principles to complicated groups of fact.

The student, to whom a text-book is not, as it is to the practicing barrister, a repository of cases for reference, but a collection of rules and principles which he desires to learn, is too apt to take these upon trust unless the cases from which they are drawn are thrust upon his notice. For this reason I have avoided the citation of numerous cases, I have endeavored to select such as form the most vivid illustrations of the rules which I have laid down, and I have placed the references to those which I have cited — where I thought they would be most conspicuous — in the margin. This is my excuse for a departure from the ordinary arrangement of references in foot notes.

To the able Treatise of Mr. Pollock and the exhaustive Digest of Mr. Leake I have made frequent references, but these do not express the extent of my obligations to those learned authors. Their books must needs enter largely into the composition of such a work as mine professes to be.

I have also occasionally referred the reader to works of a more special character, and in particular to the

great work of Mr. Benjamin for all points connected with the contract of Sale of Personality. But for the reason which I stated above I have avoided the accumulation of a mass of authority, and have often run the risk of seeming to dogmatize lest a numerous collection of references should disincline the student to the process of verification.

W. R. A.

1 BRICK COURT, THE TEMPLE.

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Y.

Young v. Cole..... 8 Bing. N. C. 724..... 202

SOME ABBREVIATIONS USED IN REFERENCE.

REPORTS.¹

A. & E.....	Adolphus and Ellis.....	Q. B. 1834-1841
B. & Ad.....	Barnwall and Adolphus.....	K. B. 1830-1834

¹ Reference to the Law Journal reports have not been given throughout the ensuing pages because the system of marginal references imposed certain limits as to space. The reports cited are accessible to any student at Oxford, and it is hoped that the information given as to the Court in which the case was decided, and the date of the report to which reference is made, will enable those who can only refer to the Law Journal to discover the cases with little difficulty.

B. & Ald.	Barnwall and Alderson	K. B. 1817-1822
B. & C.	Barnwall and Creswell	K. B. 1822-1830
B. & S.	Best and Smith	Q. B. 1851-1865
Beav.	Beavan	Rolls Court, 1838-1866
Bing.	Bingham	{ C. P. 1824-1840
Bing. N. C.	Bingham's New Cases	
Burr.	Burrows	K. B. 1756-1772
Camp.	Campbell. K. B. & C. P. nisi prius,	1807-1818
C. B.	Common Bench	{ C. P. 1845-1865
C. B. N. S.	Common Bench, New Series	
Cl. & F.	Clark and Finelly. House of Lords,	1881-1846
C. & M.	Crompton and Meeson	{ Ex. 1834-1836
C. M. & R.	Crompton, Meeson and Roscoe	
Co. Rep.	Coke's Reports	Eliz. and James
Cowp.	Cowper	K. B. 1774-1778
Cro. Eliz. or 1 Cro.	Croke, of the reign of Elizabeth.	
Cro. Jac. or 2 Cro.	" " James.	
D. & J.	De Gex and Jones	Ch. App. 1857-1859
D. F. & J.	De Gex, Fisher and Jones	" 1859-1862
D. M. & G.	DeGex, Macnaghten and Gordon	" 1851-1857
Dr. & Sm.	Drewry and Smale. V.C. Kindersley,	1859-1866
Dr. & War.	Drury and Warren	Chancery, 1841-1843
E. & B.	Ellis and Blackburn	Q. B. 1852-1858
E. & E.	Ellis and Ellis	Q. B. 1859-1861
Exch.	Exchequer	1847-1856
F. & F.	Foster and Finlason Cases at Nisi Prius	{ 1856-1867
H. Bl.	Henry Blackstone	C. P. 1776-1788
H. & C.	Hurlstone and Coltman	Ex. 1862-1865
H. & N.	Hurlstone and Norman	Ex. 1856-1862
H. L. C.	House of Lords' Cases	1846-1866
Jr. C. L.	Irish Common Law Reports.	
J. & H.	Johnson and Hemming V. C. Page Wood	{ 1859-1862
K. & J.	Kay and Johnson V. C. Page Wood,	1854-1856
L. J. Exch.	Law Journal, Exchequer	
L. J. Q. B.	" " Queen's Bench	{ 1828-
L. J. Ch.	" " Chancery	
L. R. Q. B.	Law Reports, Queen's Bench	
L. R. C. P.	" " Common Pleas	
L. R. Ex.	" " Exchquer	
L. R. Eq.	" " Equity	
L. R. Ch.	" " Chancery Appeals	
L. R. H. L.	" " English & Irish Appeals	
L. R. Sc. App.	" " Scotch Appeals	
L. R. Q. B. D.	" " Queen's Bench Division	

L. R. C. P. D.	Law Reports, Common Pleas Divisi'n	
L. R. Ex. D.	" " Exchequer Division	
L. R. Ch. D.	" " Chancery Division	1865-
L. R. App. Ca.	" " Appeal Cases	
L. R. P. C.	" " Privy Council Cases	
Lev.	Levinz	K. B. & C. P. 1660-1696
Mad.	Maddock	Vice Chancellor's Court, 1817-1820
M. & G.	Manning and Grainger	C. P. 1840-1845
M. & S.	Maule and Selwyn	K. B. 1813-1817
M. & W.	Meeson and Welsby	Ex. 1836-1847
Mer.	Merivale	Chancery, 1813-1817
Mod. Rep.	Modern Reports	
		Common Law and Chancery, 1660-1702
M. & K.	Mylne and Keen	Chancery, 1832-1837
Ph.	Phillips	" 1841-1849
Q. B.	Queen's Bench	1841-1852
Rep. in Ch.	Reports in Chancery	1625-1688
Rolle Abr.	Rolle's Abridgement	
Russ.	Russell	Chancery, 1826-1829
Sch. & L.	Schoales and Lefroy	Irish Chancery, 1802-1806
Sm. L. C.	Smith's Leading Cases	
Str.	Strange	1727-1748
T. R.	Term Reports, or Durnford and East's Reports	K. B. 1785-1796
Ventr.	Ventris	K. B. 1660-1685
Vern.	Vernon	Chancery, 1680-1718
Y. & C.	Young & Collyer V. C. Knight-Bruce	1834-1842
Yelv.	Yelverton	K. B. 1601-1618

TEXT-BOOKS.

Sav. Syst.	Savigny, System des heutigen Römischen Rechts.
Sav. Obl.	Savigny Obligationenrecht.
Pollock	Pollock on the Principles of the English Law of Contract. Second edition, 1878.
Benjamin on Sale	Second edition, 1873.
Leake	Leake's Elementary Digest of the Law of Contract. 1878.
Langdell	Selection of Cases on the Law of Contract, by C. C. Langdell.

PART I.

INTRODUCTION.

THE PLACE OF CONTRACT IN JURISPRUDENCE.

In commencing an inquiry into the principles of the law of Contract it is well to consider what are the main objects of the inquiry and in what order they arise for discussion.

It would seem that the first thing to be considered is the relation of contract to other legal conceptions; if this can be ascertained, we get some definite notion of the nature of the subject of our inquiries.

Having ascertained what a contract is, we next ask how it is made; in other words, what are the various elements necessary to the Formation of a valid contract?

The next question should be, Whom does a contract, when made, affect; or what is the Operation of contract?

After this we shall consider the Interpretation of contract, or the mode in which the terms of a contract are dealt with when they come before the Courts for consideration.

It will then remain to deal with the Discharge of contract, the various processes by which the contractual tie is loosed and the parties restored to their former position as regards their legal relations to one another.

We will begin then by considering the nature of Contract.

Contract is
an obligation
springing
from agree-
ment.

We may regard Contract as a combination of the two ideas of Agreement and Obligation. It is that form of Agreement which directly contemplates and results in an Obligation. We should therefore *2 try to get at the meaning of Agreement and Obligation; and Savigny's analysis of these two legal conceptions may with advantage be considered here with reference to the rules of English Law.

§ 1. *Agreement.*

Nature of
agreement.
Sav. System,
s. 140 4.

1. Agreement requires for its creation at least two parties. There may be more than two, but inasmuch as agreement is necessarily the outcome of consenting minds, the idea of plurality is essential to it.

2. The parties must have a distinct intention, and that intention must be common to both. Where there is doubt, or difference, there cannot be agreement. Such communications as these will illustrate the proposition:

Doubt. "Will you buy my horse if I am inclined to sell it?"

"Very possibly."

Difference. "Will you buy my horse for £50?"
"I will give you £20 for the horse."

3. There must be a communication by the parties See dicta of Lord Black-
burn, L. R. 2 App. Ca. 691. to one another of their common intention. A secret acceptance of a proposal cannot constitute an agreement. For instance, A writes to X proposing to buy

¹ In the case of *Brogden v. Metropolitan Railway Company*, in the House of Lords. The case is not reported in the Courts below, but it appears, from the report referred to, that Lord COLE RIDGE, C. J., and BRETT, J., had, in giving judgment in the Common Pleas, used language which might suggest that a mere mental consent uncommunicated to the other party might create a binding agreement. Lords SELBORNE and BLACKBURN express their dissent from such a proposition, the latter very fully and decidedly.

§ 1. PLACE OF CONTRACT IN JURISPRUDENCE. 3

X's horse for £50. X makes up his mind to accept, *Borland v. Goffey, 1 Grant (Pa.) Cases, 804.* but never tells A of his intention. He cannot complain if A buys a horse elsewhere.

4. The intention of the parties must refer to legal relations. The assumption of legal rights and duties must be the object of agreement, as distinguished from a dinner engagement or a promise to take a walk. For the purposes of English law we may *3 take it, as a test of this reference to legal relations, that the intention of the parties must have to do with "something which is of some value in the eyes of the law," something which can be assessed at a money value.

5. The consequences of Agreement must affect the parties themselves. Otherwise the verdict of a jury or the decision of a court sitting *in banc* would answer the foregoing requisites of agreement.

Agreement then is the expression by two or more persons of a common intention to affect the legal relations of those persons.

But this would clearly include much more than Agreement . Contract. Under the definition of Agreement at a wider term than which we have arrived would fall — contract.

(1) Agreements which pass property from one of two parties to another simultaneously with the expression of their common consent. Such are conveyances As to gifts, and gifts, where the agreement of the parties operates see *Hill v. Wilson, L. R. 8 Ch. 888.* at once as a transfer of rights *in rem*, and leaves no obligation subsisting between them.

(2) Agreements which effect a change of status immediately upon the expression of the consent of the parties, such as Marriage, which, when consent is expressed before a competent authority, alters at once the legal relations of the parties in many ways.

(3) Agreements which, though intended to affect legal relations, are nevertheless not enforceable at

law. Such would be a gratuitous promise to transfer property.

It would seem then that Agreements the effect of which is immediate in creating rights *in rem*, or in effecting a change of status, are not such as we ordinarily term Contracts. Nor, again, are Agreements to be called Contracts which, though intended to affect legal relations, fail to do so, because they do not fulfill some requirements of the positive law of the country in which they are made.

*4 Agreement being a term of wider meaning than Contract, we have to ascertain the characteristic of Contract as distinguished from other forms of Agreement.

A promise
an essential
feature in a
contract.

Jurispru-
dence, 939.

We are always in the habit of considering that an essential feature of a contract is a *promise* by one party to another, or by two parties to one another, to do or to forbear from doing some specified acts. Austin in fact speaks of a contract as a *promise*, meaning thereby an accepted promise, as distinguished from that which he calls a *pollicitation*, an unaccepted promise, or offer.

A promise which a man is legally bound to perform creates an obligation or right *in personam* against him in favor of the party to whom the promise is made. It follows, therefore, that we should consider the nature of Obligation and try to distinguish the contractual from other forms of Obligation.

§ 2. *Obligation.*

Nature of
obligation.
Sav. Obl. ch.
1, ss. 2-4

Obligation is a power of control, exercisable by one person over another, with reference to future and specified acts or forbearances. The characteristics of Obligation would seem to be these:

1. Two parties, one or both invested

§ 2. PLACE OF CONTRACT IN JURISPRUDENCE. 5

power which he is capable of exercising over the acts with control of the other, while that other so far suffers a diminution of his ordinary freedom of action. These persons or groups are thus bound to one another by this peculiar and special relation; they are connected by what the Roman lawyers called *vinculum juris*, a legal tie.

It is obvious that such a relation necessitates two parties; a man cannot be under an obligation to himself, nor even to himself in conjunction with others. Where a man borrowed money from a fund in which he and others were jointly interested, and covenanted to repay the money to the joint account,

*5

it was held that he could not be sued upon his covenant. "The covenant, to my mind, is senseless," said POLLOCK, C. B. "I do not know what is meant in point of law by a man paying himself." (a)

Faulkner v.
Lowe, 2 Ex. 595; Eastman v. Wright, 6 Pick. 816.

2. The second feature of an Obligation is that it relates to certain definite acts. The freedom of the person bound is not generally curtailed, but is limited in some special matters and with reference to some particular act, or series, or class of acts. To use Savigny's illustration, Obligation stands in a relation to individual freedom similar to that in which *servitude* stands to *dominium* or the indefinite rights of ownership. For instance, I am owner of a field; my proprietary rights are general and indefinite; my neighbor has a right of way over my field; my rights are to that extent curtailed by his, but his rights are very definite and special. So with Obligation. My individual freedom is generally unlimited and indefinite. As with my field so with myself: I may do what I like with it so long as I do not infringe the rights of others. But if I enter into a contract to do a work for A by a certain time and for a certain reward, my general freedom of action is abridged by

(a) (The remedy in this case would be by bill in chancery.)

the special right of A to the performance by me of the stipulated work; and A again is similarly obliged to receive the work, and to pay the reward.

8. And these must be reducible to a pecuniary value.

3. The thing to be done must be such as possesses, or is reducible to, a pecuniary value. This is needed in order to distinguish legal from moral and social relations. If a man saves me from drowning I am under a moral obligation to him, but neither my life nor my gratitude can be estimated at a money value. If two friends agree to pursue certain studies together, it is again impossible to estimate in money the advantage which they may derive from their mutual employment, or the disappointment which one may experience if the other should break his promise.

These then are the principal features of Obligation.
***6** It gives to one man a control over the actions of another, definite in character, and capable of being reduced to a pecuniary value.

Distinguish
two senses of
obligation.

But before discussing the various kinds of Obligation it is well to note the double meaning in which the term is used by Austin and Bentham, and the desirability of keeping clearly before the mind the sense in which it is most convenient that it should be employed for our present purposes.

(1) General duty.
(2) Special tie.

Obligation is indiscriminately used, (1) as meaning any Duty imposed by law, (2) as meaning that special Right and Duty which create a *vinculum juris* between two persons or groups of persons.

It is in the second sense only that the word should be employed. In its first sense it merely means the general duty which the law imposes, to respect such rights as the law sanctions. This duty is not an obligation, for no two definite persons or groups are bound together by it. I have a right to my good name, a right *in rem*, against all persons subject to the laws which sanction my right. But I am not thereby bound in any special manner to the indi-

§ 2. PLACE OF CONTRACT IN JURISPRUDENCE. 7

viduals constituting the political society in which I live. I cannot be bound to a whole community. If X libels me, my right is broken by a definite individual; an obligation at once springs up and binds us to one another; a *vinculum juris* encircles us, and is not loosed till my injured right is made good. It will very much assist the consideration of Contract if we keep always before us this conception of a legal tie binding the parties to certain definite acts, and binding them, once it is truly formed, until the obligation is discharged.

Having thus obtained a general idea of Obligation, Kinds of we may try to distinguish the various modes in which obligation. Obligation originates.

1. Obligation may originate in Agreement. Here we find that form of agreement which constitutes a contract; a voluntary consent to the creation of an Obligation by the parties who are to be bound. The agreement, being such as we have described it, has for its object the creation of an Obligation, a legal tie by which the parties to the agreement are bound to one another in respect of some future acts or forbearances.

2. Obligation may arise from Delict. This occurs where a right has been violated and the wrong-doer is bound to the injured person to make good the consequences of his breach of Duty. Such an obligation is not created by the free will of the parties, but springs up immediately upon the occurrence of the wrongful act or omission.

3. Obligation may arise from Quasi Contract, a convenient term for a multifarious class of legal relations possessing this common feature, that one of two parties has obtained some pecuniary advantage, to which he is not entitled, at the expense of the other. The process by which this advantage has been gained is, roughly speaking, that A has made a payment

which X ought to have made, or that X has received money which A ought to have received. The modes in which this relation arises in English law will be dealt with briefly at a later stage. It is enough to note here that the law imposes upon the parties the contractual relation, assuming a binding promise by X to make good to A the advantage which he has gained at A's expense.

4. On breach of contract. 4. Again, Obligation may arise from a breach of Contract. While A is under promise to X, X has a right against A to the performance of his promise when performance becomes due, and to the maintenance up to that time of the contractual relation. But if A breaks his promise, the right of X to the performance has been violated, the contract is discharged, and a new obligation springs up, a right of Action, exactly similar in kind to that which arises upon a delict or a breach of a Duty.

5. Judgment. 5. The judgment of a Court of competent jurisdiction, ordering something to be done or forborne by one of two parties towards the other, is also a source of Obligation. It is an Obligation of this character which is unfortunately styled a "Contract of Record" in English law. Unfortunately, because the Obligation does not spring directly from Agreement, but is imposed on the parties *ab extra*.

6. Miscellaneous. 6. Lastly, there is a class of Obligation which it is sometimes hard to distinguish from Contract. A trustee and his *cestui que trust*, a husband and wife, an executor and legatee, have rights one against the other which are, strictly speaking, obligations or *jura in personam*. The real distinction between these cases and the contractual obligation is twofold. In the case of the trustee and the executor, the acceptance of the obligation, though voluntary on the part of him on whom the bulk of its duties fall, need not, or cannot, be the result of an agreement between the

parties bound. Even where the obligation springs from Agreement, its creation is not the direct object of the transaction.

The object of the creation of a trust is to transfer rights *in rem* as well as to create rights *in personam*. The object of marriage is to effect a change of status. The object of becoming an executor or administrator is to acquire in great measure the legal existence of the deceased, and not merely obligations towards legatees. Obligations of this kind are merely incidental to a creation or transfer of a group of rights and duties. The creation of an obligation is the one object which the parties have in view when they enter into that form of Agreement which is called *Contract*.

We may now attempt to define Contract, or the Attempted result of this concurrence of Agreement and Obliga- definition of contract.

Contract is an Agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other.

And it may be as well to add that there are agreements, such as marriage, the creation of a trust, a conveyance of land with covenants annexed, a *9 sale of a chattel with a warranty, in which contractual obligations arise incidentally to the main purposes of the transaction. Where the contractual obligation can be easily severed from the bulk of the rights and duties created by the Agreement it is possible to regard it as a part of our subject: the warranty or the covenants may be so dealt with. But in the other cases the obligation is so involved in the mass of rights and duties created, and so entirely incidental to the rest of the transaction, that it is better to exclude it from the present discussion.

*10

PART II.

THE FORMATION OF CONTRACT.

HAVING ascertained the particular features of contract as a juristic conception, the next step is to ascertain how contracts are made. A part of the definition of contract is that it is an agreement enforceable at law; it follows, therefore, that we must try to analyze the elements of a contract such as the common law will hold to be binding between the parties to it.

Elements
necessary to
a valid con-
tract.

These elements appear to consist:

1. In a distinct communication by the parties to one another of their intention; in other words, in Proposal and Acceptance.
2. In the possession of one or other of those marks which the law requires in order that an agreement may affect the legal relations of the parties. These marks are Form and Consideration.
3. In the Capacity of the parties to make a valid contract.
4. In the Genuineness of the consent expressed in Proposal and Acceptance.
5. In the Legality of the objects which the contract proposes to effect.

Results of
their ab-
sence.

Where all these elements co-exist, a valid Contract is the result: where any one of them is absent, the agreement is in some cases merely unenforceable, in some voidable at the option of one of the parties, in some absolutely void.

CHAPTER I.

*11

PROPOSAL AND ACCEPTANCE.

EVERY expression of a common intention arrived at Agreement by two or more parties is ultimately reducible to ques.^{must originate in pro-}tion and answer. In speculative matters this would posal and take the form, "Do you think so and so?" "I do." ^{acceptance.} In practical matters and for the purpose of creating obligations it may be represented as, "Will you do so and so?" "I will." If A and X agree that A shall ~~will~~ purchase from X a property worth £50,000, we can trace the process to a moment at which X says to A, "Will you give me £50,000 for my property?" and A replies, "I will." If A takes a sixpenny book from X's book-stall the process may be represented thus: X in displaying his wares says in act though not in word, "Will you buy my goods at my price?" and A, taking the book with X's cognizance, virtually says, "I will." And so the law is laid down by Blackstone: Comm. bk. 2, c. 30. "If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value."

In order to create a voluntary obligation there must be a promise binding the person subject to the obligation; and in order to give a binding force to the promise the obligation must come within the sphere of Agreement. There must be an acceptance of the promise by the person to whom it is made, so that by their mutual consent the one is bound to the other. A Contract then springs from the offer of a promise and its acceptance. Let us now see what forms this process may assume.

How proposal and acceptance must be made as are made under seal. For in English law no promise, which is not under seal, is binding unless the promisor obtains some benefit in return for his promise, and this benefit is called "Consideration."

*12 The simple and obvious form just described is applicable in English law only to such contracts as are made under seal. For in English law no promise, which is not under seal, is binding unless the promisor obtains some benefit in return for his promise, and this benefit is called "Consideration."

Bearing this necessity in mind, we may say that proposal may assume two forms, the offer of a promise, and the offer of an act. Acceptance may assume three forms, simple assent, the giving of a promise, or the doing of an act.

And thus a contract may originate in one of four ways.

1. In the offer of a promise and its acceptance by simple assent: which in English law applies only to contracts under seal.

2. In the offer of an act for a promise, as if a man offers services which when accepted bind the acceptor to reward him for them.

3. In the offer of a promise for an act, as when a man offers a reward for the doing of a certain thing, which being done he is bound to make good his promise to the doer.

4. In the offer of a promise for a promise, in which case when the offer is accepted by the giving of the promise, a contract arises consisting in outstanding obligations on both sides.

Some simple illustrations will explain these forms of proposal and acceptance.

Illustrations. See on this point Xenos v. Wickham, L. R. 2 H. L. 296. Townson v. Tickell, 8 B. & A. 87; Tuttie v. Love, 7 Johns, 470.

1. A promises X under seal that he will do a certain act or pay a certain sum. When X has assented to the proposal both are bound, and there is a contract.

Till he has assented there is an offer, which, as will be noted presently, is irrevocable so far as A is concerned, owing to the particular form in which it was made, but which cannot bind X until he has assented to it.

2. A man gets into a public omnibus at one end of Oxford street and is carried to the other. The presence of the omnibus is a constant offer by its proprietors of such services upon certain terms; they offer an act for a promise; and the man who accepts these services promises by his acceptance to pay the fare at the end of the journey.

3. The man who loses his dog offers by advertisement a reward of £5 to any one who will bring the dog safe home; he offers a promise for an act; and when X brings the dog safe home the act is done and the promise becomes binding.

4. A offers X to pay him a certain sum of money on a future day if X will promise to perform certain services for him before that day. When X makes the promise asked for, he accepts the promise offered, and both parties are bound, the one to do the work, and the other to allow him to do it and to make the payment.

It will be observed that cases 2 and 3 differ from 4 in an important respect. In 2 and 3 the contract is formed by one party to it doing all that he can be required to do under the contract. It is performance on one side which makes obligatory the promise of the other; the outstanding obligation is all on one side. In 4 each party is bound to some act or forbearance which, at the time of entering into the contract, is future: there is an outstanding obligation on each side.

Where the benefit in return for which the promise is given, is done contemporaneously with the promise acquiring a binding force; where it is the doing of the act which concludes the contract, then the act so done is called an *executed* or present consideration for the promise. Where a promise is given for a promise, each forming the consideration for the other, such a consideration is said to be *executory* or future.

We may now lay down briefly the rules which govern Proposal and Acceptance, or the communication of the common intention to create an obligation.

Rule 1. Proposal must be intended to affect legal relations. *14 § 1. *The proposal must be intended to affect, and capable of affecting, legal relations.*

A proposal to be made binding by acceptance, must be made in contemplation of legal consequences; a mere statement of intention made in the course of conversation will not constitute a binding promise, though it be acted upon by the party to whom it was made. Thus in the case of *Week v. Tibold*, the defendant told the plaintiff that he would give £100 to him who married his daughter with his consent. Plaintiff married defendant's daughter with his consent, and afterwards claimed the fulfillment of the promise and brought an action upon it. It was held not to be reasonable that a man "should be bound by general words spoken to excite suitors."

Guthing v. Lynn, 2 B. & Ad. 232. And a proposal must be capable of affecting legal relations, that is to say it must not be so indefinite or illusory as to make it hard to say what it was that was promised. Thus where A bought a horse from X and promised that "if the horse was lucky to him he would give £5 more or the buying of another horse," it was held that such a promise was too loose and vague to be considered in a court of law.

Taylor v. Brewer, 1 M. & S. 200. And so where A agreed with X to do certain services for such remuneration as should be deemed right, it was held that there was no promise on the part of X which was sufficiently definite to be capable of enforcement. "It seems to me," said one of the judges, "to be merely an engagement of honor." (a)

(a) The action in the case cited in the text was brought to recover for work done by plaintiff by virtue of a resolution of defendants, who were a committee for the management of a lot-

§ 2. Acceptance must be absolute, and identical with the terms of the proposal.

Unless this is so the intention expressed by one of the parties is either doubtful in itself or different from that of the other. If A offers to X to do a definite thing and X accepts conditionally, or introduces a new term into the acceptance, his answer is *15 either a mere expression of willingness to treat, or it is in effect a counter proposal.

A proposed to sell a property to X, X accepted "subject to the terms of a contract being arranged" between his solicitor and A's. Here it was held that there was no agreement, for the acceptance was not final, but subject to a discussion to take place between the agents of the parties.

A proposed to sell a farm to X for £1,000, X said he would give £950. A refused this offer, and then X said that he was willing to give £1,000. A was no longer ready to adhere to his original proposal and endeavored to obtain specific performance of the contract. But it was held that his offer to buy at £950 in answer to A's offer to sell for £1,000 was a refusal of the offer of A and a counter proposal, and that he could not after this hold A to his original offer.

The resolution was as follows: "Resolved. That any services to be rendered by Walsh shall, after the third lottery, be taken into consideration, and such remuneration be made as shall be deemed right." The court held that the import of the resolution was, that the committee was to be the judge whether plaintiff was to have any recompense, and if so, how much. If one party has agreed with another to do a piece of work for what was right, there is no doubt that he would now be permitted to recover the value of the work upon a *quantum meruit*. Blackstone's Com., book 3, p. 161; Chitty on Pleadings, 16 Am. Ed., vol. 1, 852. Bryant v. Flight, 5 M. & W. 114; Jewry v. Bulk, 5 Taunt. 802.)

Till acceptance no rights arise.

§ 3. A proposal which has not been accepted does not affect the rights of the parties.

See dicta of Lord Selborne, L. R. 2 App. C. 688; (Borland v. Guffey, 1 Grant Cas. 394.)

If a qualified acceptance does not make a proposal binding it would seem to follow naturally that a proposal which was not accepted at all will not bind either the proposer or the person to whom his offer is addressed. In the case of contracts which are made by the acts of the parties, and not by proposal and acceptance in words, it would appear that silence must give consent, but then it must be silence coupled with some overt acquiescence.

The two following cases will serve to illustrate the rule. A offered by letter to buy X's horse for £30 15s., adding "if I hear no more about him I consider the horse is mine at £30 15s." No answer was returned to the letter and it was held that there was no contract.

See post, p. 23. A person making a proposal may, as it will appear, prescribe a form of acceptance, but he may not turn the absence of communication into an acceptance, and compel the recipient of his offer to refuse it at peril of being construed to have accepted it.

*16 A very similar case, in which the offer was acted and not written, was the case of *Taylor v. Laird*. There the plaintiff, unasked, helped to work the defendant's vessel home. When he came home he claimed reward for his services. But it was held that since the defendant had never had the option of rejecting the services while they were being rendered, and did in fact repudiate them when he became aware of them, he was not liable for their value. The plaintiff had in fact made an offer which, uncommunicated and unaccepted, could give him no rights against the party to whom it was addressed.

The cases just quoted show that a man cannot by any form of offer bind the person to whom it is made before he has expressed his assent. It is almost

equally true to say that his proposal until it is accepted does not bind himself, but this last proposition must be taken subject to some reservations in the case of seal. Except in the case of "n
offer under promises made under seal.

There is no doubt that a grant under seal may be binding on the grantor and those who claim under him, though it has never been communicated to the grantee, if it has been duly delivered to a third party. And it would seem that a deed purporting to create an out-standing obligation would stand on the same footing.

"If A make an obligation to B and deliver it to C, this is the deed of A presently. But if C offers it to B, then B may refuse it *in pais*, and thereby the obligation will lose its force." The position of the parties, where the obligation is not communicated to the party in whose favor it is made, is a somewhat curious one.

Agreement there can be none, for there is no mutual assent, and it is open to the one to refuse the obligation which the other would create in his favor. It would seem that he who has made and delivered the deed is in the position of a man who has made an offer of a promise which he may not revoke, but which is not a contract till it is assented to by the promisee.

The point was much discussed in *Xenus v. Wickham*, in which a policy of marine insurance "signed, sealed and delivered" by the defendants, the insurers, was never accepted by the plaintiff, the insured, but remained in the defendant's office. It was held in the House of Lords that the assent of the person insured at the time of delivery was not necessary to entitle him, when he became aware of the loss of his ship, to the benefit of the policy. "The efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it." (a)

L. R. 2 H. L.
296. (See Far-
rarv. Bridges,
5 Humph.
(Tenn.) 411.)

(a) (The facts of the case cited would seem to show that it was
17—2

Revocability § 4. *A proposal may be revoked before acceptance but of proposal. not after; an acceptance is irrevocable.*

This rule follows from what has gone before. A proposal creates no legal rights; an acceptance of a proposal makes a binding contract, unless there be wanting some of the elements already mentioned as necessary to the Formation of Contract. As a pro-

decided upon other grounds than those given in the text. The statement shows that the shipowner applied to an insurance broker, to obtain for him an insurance upon a vessel, for six months, in certain seas. The custom among underwriters and brokers was, for the broker to make a memorandum of the description of the vessel, the voyage, etc., and submit it to the underwriter who marked the amount of risk it was willing to take upon the vessel. This broker was not in the habit of paying the premium on each risk, but kept an account with the insurer, and settled at stated times. When the risk was accepted the policy was made out from the slip containing the memorandum. In this case the underwriter's clerk marked the slip for £2,000, but before the policy was written, the owner changed his mind and desired to insure for a year and in all seas, and a new slip was made out instead of the old one, and marked for £1,000, and the policy was made out, signed, sealed, and delivered, as shown upon its face, but it remained at the underwriter's office. The premium was paid to the broker, but had not been paid by him to the insurer, when the broker, by mistake, ordered the policy to be canceled and a memorandum of cancellation was written upon the margin of the policy and it was delivered to the broker, that he might get the stamp duty refunded. The broker discovered his mistake, and then requested that the memorandum should be erased, but the underwriter refused to do so except upon the condition that the vessel was then safe and not in the Baltic. The vessel had been lost at that time, and the owner sued the underwriter.

The House of Lords held that the plaintiff was entitled to recover, as the contract had been made and the broker had no authority to order the policy cancelled.

The question of assent or acceptance of the policy by the ship owner does not seem to have arisen in this case, and from the facts we cannot deduce the principle that an offer made under seal would be construed to remain open after the loss it was proposed to guard against had actually occurred. Upon the necessity of acceptance by grantee, see *Woodbury v. Fisher*, 20 Ind., 387.)

posal creates no legal rights, it is obvious that it may be withdrawn before acceptance; but as respects the communication of the withdrawal or revocation to the party to whom the offer is made, a distinction exists which needs to be noted, and which may be stated thus:

- (a) Where the parties are in immediate communication a proposal may be revoked without notice to the person to whom it has been made.¹
- (b) Where the parties communicate by correspondence, notice of revocation, in order to be valid, must reach the person to whom the proposal was made before he was accepted.

(a) Two cases will illustrate the rule that when the parties are in immediate communication no notice of revocation is necessary. The first is the well-known case of *Cook v. Oxley*. The case was decided on the pleadings. Oxley offered to sell goods to Cook, and promised to keep his offer open till 4 o'clock in the afternoon. Cook signified his acceptance before 4 o'clock, and when Oxley failed to deliver the goods brought an action against him. But it was held that if he sued on a promise to keep the offer open till 4 o'clock he must fail, because there was no consideration for the promise; and that if he relied on his acceptance as constituting a binding contract he must fail, because he did not state in his declaration that Oxley had not sold the goods, and so substantially revoked his offer, before the time of acceptance. The Court thus clearly contemplated a revocation of the offer of the defendant as possible at any time before acceptance, and did not regard notice to the plaintiff as essential to the validity of the revocation.

Cook v. Oxley, 3 T. R. 653.

¹ Mr. Pollock, in his work on Contract, p. 10, lays it down that "a proposal is revoked only when the intention to revoke it is communicated to the other party." We venture however to think that this rule must be received with the limitations suggested by the cases cited in the text.

L. R. 2 Ch. D. 403. (See Boston & Maine lett. 8 Cush. 225.) Similar in point is *Dickinson v. Dodds*, which was an attempt to obtain specific performance of a contract under the following circumstances. The defendant on June 19th, 1874, gave the plaintiff a memorandum in writing as follows: "I hereby undertake to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800. As witness my hand this 10th day of June, 1874.

£800. (Signed) JOHN DODDS."

"P. S. This offer to be left over until Friday, 9 o'clock, A.M. J. D. (the twelfth) 12th June, 1874.

(Signed) J. Dodds.

On the 11th of June he sold the property to another person without notice to the plaintiff. The plaintiff gave notice before the stipulated time, but after the sale, that he accepted the offer to sell, and sued for specific performance of what he alleged to be a binding contract. But the Court of Appeal, reversing the judgment of BACON, V. C., held that no contract

had been concluded. JAMES, L. J., deals thus

*19 with the promise to keep the offer open, and with the fact that no notice had been given of its revocation:—"It is clear settled law, on one of the clearest principles of law, that this promise being a mere *nudum pactum* was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." I apprehend that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two

minds were at one at the same moment of time, that is, that there was an offer continuing up to the moment of acceptance. If there was not such a continuing offer, then the acceptance comes to nothing."

(b) Where the parties are at a distance from one another and communicate their intention by correspondence a different rule prevails. Unless the acceptor has received notice of revocation before his acceptance, the revocation is inoperative. This is perhaps a broader statement of the rule than actual decisions in English Courts may justify; but it is a fair inference from the language of the court in the leading case upon the subject, and is supported by an American case which is directly in point. Two illustrations will show in what respect the rule as laid down exceeds the limits of the English cases:

On the 1st of January A writes to X offering to sell goods: on the 3rd he writes to revoke his offer, but X has already written on the 2nd a letter of acceptance which A receives on the 4th. Here there is no doubt that A would be bound by the acceptance.

On the 1st of January A writes to X offering to sell goods: on the 2nd he writes to revoke his offer, but, before his letter reaches X, X has written to accept. Here the intentions of the parties are not *ad idem* at the moment of acceptance, but it is nevertheless probable that "A would be regarded in law as making, during every instant of the time his letter was traveling, the same identical offer" to X, and that he would be bound by the acceptance though made after he had changed his mind. There is no doubt that by the rules of American law such an acceptance would be binding.

The reasons for this rule are obvious. It is necessary, where parties are contracting at a distance, to fix some moment of time when the contract should be complete, for otherwise a man who accepted an offer

made to him and acted upon it immediately might be exposed to serious loss if the proposer could revoke his offer at any moment before the actual receipt of the acceptance. Nor, on the other hand, would it conduce to the conduct of business if the acceptor was forced to postpone acting upon the contract until he heard that his letter had reached the proposer. It is necessary therefore to fix a moment for the conclusion of the contract; this moment is the moment when he to whom the offer is made signifies his acceptance; and the acceptance is signified when the acceptor has done all that he can to communicate his intention. In other words, the moment of acceptance is the moment of despatch. An acceptance once despatched is irrevocable, for the contract is then made.

1 B. & Ald.
631.

The leading case on this subject is *Adams v. Lindsell*. In that case the defendant offered to sell wool to the plaintiff by letter dated Sept. 2nd, 1817. The letter was misdirected, and so did not reach the plaintiff till Sept. 5th: he accepted by letter posted that evening, but the defendant had in the meantime sold the wool to others. The plaintiff sued for non-delivery of the wool, and it was argued on behalf of the defendant that no contract could arise until the plaintiff's answer reached him. But the court said "that if that were so no contract could ever be completed by the post. For if the defendants were not bound by their offer, when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs; and then the contract is concluded by the acceptance of it by the latter."

The law as laid down in this case has been followed in several others down to the present time. But the rights of the parties where the letter of acceptance is lost or unreasonably delayed, are not altogether satisfactorily settled.

In *Dunlop v. Higgins*, Lord COTTENHAM appears to have held, though the point was not necessary to the decision of the case, that the posting of an acceptance absolutely concluded the contract, whatever might afterwards become of the letter. This view was discussed and some limitations to it suggested by the Court of Exchequer in the *British and American Telegraph Company v. Colson*. But the law on the subject perhaps finds its best expression in the judgment of MELLISH, L. J., in *Harris' Case*, in which he says that "although the contract is complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent, that if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted." (a)

The framers of the Indian Contract Act do not appear to have thought it necessary that the moment of acceptance should be fixed as that at which the contract acquires an irrevocably binding force. Section 4 of that Act provides as follows:

"The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made."

"The communication of an acceptance is complete as against the proposer, when it is put in a course of

(a) (The latest adjudication of the English courts upon this subject is found in *Household, Fire and Carriage Accident Co. v. Grant*, 24 Weekly Reporter, 858, where the Court of Appeals refuses to follow the doctrine of the Harris Case, and holds that the contract is still binding, though the letter of acceptance is never delivered, as it is completed by mailing the letter.)

transmission to him so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer.

"The communication of a revocation is complete as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge."

It is perhaps sufficient to note the divergence from English law without commenting on its propriety; but it may be worth while to consider whether, from a practical as well as from a scientific point of view, it is desirable that in the formation of a contract there should be a period in which one party is bound while the other remains free.

Other modes in which proposal may lapse § 5. *A proposal may lapse otherwise than by revocation as follows:*

(a) By lapse of a prescribed time for acceptance. An offer to sell goods "receiving your answer in course of post" would lapse upon failure to accept in course of post, i. e., by return of post, and the proposer would be relieved from liability upon a subsequent acceptance.

(b) By lapse of a reasonable time for acceptance. What is a reasonable time must needs depend on the nature of the proposal. The best illustration of the rule is the *Ramsgate Hotel Company v. Montefiore*.

L. R. 1 Exch. 100. (Beck-with v. Chewer, 1 Foster, 41.) The defendant offered to purchase shares by letter on the 28th of June; no communication was made to him until the 23rd of November, when he was informed that shares were allotted to him. He declined to accept them, and it was held that the proposal had lapsed, without notice of revocation, by efflux of a reasonable time for acceptance.

*23 (c) By failure to comply with a condition in the proposal as to the mode of acceptance.

A offered to sell flour to X, the answer to be sent by return of the wagon which brought the offer: X sent a letter of acceptance by mail to another place, which was not the destination of the wagon, having reason to think that so his answer would reach A more speedily. It was held that A was not bound by an acceptance so sent. *Eliason v. Henshaw, 4 Wheaton, 225.*

(d) By death of the proposer before acceptance.

This operates as an absolute revocation, so that even though the acceptor has acted upon the contract before he knew of the death of the proposer he cannot acquire rights against the representatives of the proposer. *Per Mellish L J., in Dickenson v. Dodd, L. R. 2 Ch. D. 475. (Frith v. Lawrence, 1 Paige, 434.)*

(e) By death of the acceptor before acceptance.

The representatives of a person to whom an offer is made are not capable of acting upon it, if the deceased had not accepted it in his lifetime. *Humphrey v. Werner, 2 M. & G. 853.*

§ 6. Proposal and acceptance need not necessarily be written or spoken, but may be acted, wholly, or in part. Contracts arising from conduct.

If A sends goods to X's house and X accepts and uses the goods, X will be liable on an implied contract to pay for them. The proposal is made by sending the goods, the acceptance by their use or consumption, which is in fact a promise to pay their price. *Hart v. Mills, 15 M. & W. 87.*

Similarly, if A ask X to work for him for hire, X may accept simply by doing the work, unless A has in his proposal prescribed any form of acceptance. Or, again, if A allows X to work for him under such circumstances that no reasonable man would suppose that X meant to do the work for nothing, A will be liable to pay. The doing of the work is the proposal, the permission or acquiescence in the doing it is the acceptance. *Pnynter v. Williams, 1 C. & M. 810.*

And this rule has been applied to cases where there has been a verbal offer and acceptance which is invalid for non-compliance with the requirements of the Statute of Frauds. A part performance *(Abbott v. Hermon, 7 Greenl. 121.) *24*

of such an agreement has been held to create a binding contract to pay for so much as has been accepted of the performance. The original agreement is invalid; the performance under it creates a fresh proposal; the acquiescence in such performance a fresh acceptance, so far as the performance has gone; and a new and binding contract thus takes the place of the first invalid agreement.

*Mavor v.
Pyne, 8 Bing.
285. (Sims v.
McEwen, 27
Ala. 184.)*

*Taylor v.
Laird, 25 L.
J. Exch. 829.*

*Henderson v.
Stevenson, L.
R. 2 Sc. App.
470. (Beck-
man v.
Shouse, 5
Irawie, 179.)*

But it must be remembered that contracts of this nature are subject to the same rules as to Proposal and Acceptance, as those which govern contracts made in words or writing. If the acts which constitute the proposal by A are not brought to the knowledge of X, there is no communicated offer. If so soon as he knows of them he repudiates liability in respect of them, there is no acceptance. And the same rule applies to cases such as the contract between a passenger and a railway company, which arises from an acceptance by conduct of an offer comprised in various written terms. The acceptor is not bound by terms as to which he has received no notice.

§ 7. A proposal need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.

An offer may be made to all the world. A contract cannot arise from it till it is accepted by one.

The proposition is best understood by an illustration. The proposal by way of advertisement of a reward for the rendering of certain services, addressed to the public at large, becomes a contract to pay the reward so soon as an individual renders the services, but not before.

To hold that any contractual obligation exists before the services are rendered, would amount to saying that a man may be bound by contract to an indefinite and unascertained body of persons, or, as it has been expressed, that a man may have a contract with the

whole world. This would be contrary to the notions both of Agreement and Obligation, which we have ascertained to co-exist in Contract. *25
Agreement is the expression of a common intention, and there can be none while intention is expressed on one side only; nor can we say that Obligation in the sense of a *vinculum juris* exists between a definite proposer and an indefinite mass of persons to whom it is open to accept his proposal. The matter would have seemed beyond doubt if it were not that Savigny's view. Savigny considered that an obligation of this indefinite character was created by such a proposal as we have described. From the difficulties which would arise, owing to the obligation being incurred to unascertained persons, he would allow no right of action to accrue, but, upon the performance of the condition, he put the promisor in the position of a man who owes a debt of honor which is not recoverable in a Court of Law. This view has never been seriously entertained in English law; the promise is regarded as being made, not to the many who *might* accept the offer, but to the person or persons who *do* accept it. One may think, with submission to the great authority of Savigny, that his mode of dealing with this subject arises from a disregard or forgetfulness of the principle that the pre-eminent features of Obligation is the binding together of definite persons by *vinculum juris*; that until the parties have emerged from the mass of mankind the bond cannot attach to them.

The difficulties which have arisen in English law are Difficulties of a somewhat different character, but are capable, it in English law. should seem, of a satisfactory solution. They spring from two sources. (1) The acceptor may not, at the time of his doing what amounts to an acceptance, realize all the terms of the offer: can he afterwards take advantage of them? (2) It is sometimes difficult to distinguish representations of intention to act in a

particular way, from invitations which, if accepted, become binding promises.

(1) Motive of
acceptance.
4 B. & Ad.
621.

[Janvrin v.
Town of
Exeter, 48 N.
H. 58.]

The first difficulty is well illustrated by the *26 case of *Williams v. Carwardine*. Reward was offered by the defendant for information which the plaintiff supplied, though not with a view to the reward. It was held that the defendant was liable as upon a contract concluded by the supply of the information asked for.

If it appeared clearly from the facts of this case as reported that the plaintiff was unaware of the defendant's offer, it might be asked, whether that could be an agreement in which one of the parties knew nothing of the intention of the other. But the only point urged in the argument for the defendant was that the reward was not the motive which induced the plaintiff to supply the information, and the Court held that the motive was immaterial, and that "there was a contract with the person who performed the condition mentioned in the advertisement." [But the Court of Appeals of New York held that, when information which led to the arrest was given by plaintiff before notice of the offer of the reward, he was not entitled to the reward, although he afterward procured important evidence in the case, upon the ground that there could be no acceptance of an offer of which the party had no knowledge.]

[Fitch v.
Snedaker, 38
N. Y. 248.]

Intimation
of course of
conduct as
distinct from
invitation.

Pollock on
contract, 181.

The second difficulty has been suggested as arising in cases where a public body, or an individual, a railway company, or the manager of a theater, makes a standing offer to the public at large to carry them, or to entertain them in a certain manner and subject to certain terms. And it has been asked, in substance, whether an acceptance of the general offer in such a case binds the proposer to fulfill all his terms.

Railway
time-table.

[See Gordon
v. R. R. Co.,
52 N.H. 596.]

For instance, does the existence of its published time-table bind a railway company to carry passengers according to its terms?

The answer is that the time-table is not, as Mr. Pol. p. 181. lock seems to suggest, the offer of a separate promise, but a term in the general contract to carry: and the *LeBlanche v. L. & N. W. R. Co., 1 C. 283;* judicial interpretation put upon this term is, that when a passenger has accepted the general offer by P. D. 283; demanding a ticket, he becomes entitled to reasonable [Sears v. Eastern R. R. 14 Allen 433.] efforts being made on the part of the company to ensure punctuality.

Similarly it might be said, though the question may probably never arise, that the manager of a theater offers to any one who takes tickets for a particular play, that reasonable diligence shall be used to secure the performance of the piece advertised. If the disappointed playgoer can show a failure of such diligence, and should think it worth while to sue for the price of his ticket, it is not impossible that he might recover upon the principle laid down in *Le Blanche v. London and North Western Railway Company.* L. R. 1 C. P. D. 286.

But there are some cases of more real difficulty than these; cases in which it is hard to distinguish general offers the acceptance of which by individuals constitutes a contract, for declarations of intention upon which persons may act without affecting their legal relations.

The two following cases will well illustrate the fine-ness of the distinction. In *Harris v. Nickerson* an advertisement by an auctioneer, that a sale of certain articles would take place on a certain day, was held not to bind the auctioneer to sell the goods, nor to make him liable upon a contract to indemnify persons who were put to expense in order to attend the sale. BLACKBURN, J., said: "Unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are withdrawn, we cannot hold the defendant liable."

On the other hand, the advertisement of a sale *without reserve* was held, in *Warlow v. Harrison*, to create a binding contract between the auctioneer and the highest bidder that the goods should be knocked down to him. "The sale," said MARTIN, B., "was announced by them (the auctioneers,) to be 'without reserve.' This, according to all the cases both at law and in equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not:

15 M. & W. *Thornett v. Haines*. We cannot distinguish the case
367.

of an auctioneer putting up property for sale
*28 upon such a condition from the case of the loser
of property offering a reward, or that of a railway company publishing a time-table stating the times when, and the places to which, the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue
5 E. & B. 800. as upon a contract with him: *Denton v. Great Northern Railway Company*. Upon the same principle, it seems to us that the highest *bona fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve." Such was the opinion of a majority of the Court of Exchequer Chamber.

*Warlow v.
Harrison*, 1
E. & B. 316;
[8 Am. L.
Reg. 241.]

The substantial difference between the cases seems to lie in this, that not merely the number, but the intentions of the persons who might attend the sale must be unascertainable, nor could it be certain that their legal relations would be eventually altered by the fact of their attendance. A might come intending to buy but might be out-bid, B might come with a half-formed intention of buying if the goods went cheaply, C might come merely for his amusement. It would be impossible to hold that an obligation could be established between the auctioneer and this indefinite body

of persons, or that their losses could be ascertained so as to make it reasonable to hold him liable in damages. The highest bidder, on the other hand, is an ascertained person, fulfilling the terms of a definite offer. The distinction therefore bears out the proposition laid down at the commencement of this discussion.

*29

CHAPTER II.

FORM AND CONSIDERATION.

Necessity for one of these marks in English law. WE have now dealt with the mode in which the common intention of the parties shall be communicated by the one to the other so as to form the basis of a contract. But it is not enough that such communication should be made as we have described, or even that the parties should intend it to refer to legal consequences. Most systems of law require certain marks to be present in the agreements which they will recognize as contracts, and if those marks are absent the intention of the parties will not avail to create an obligation between them. In English law there are two such marks — Form and Consideration; sometimes one, sometimes the other, sometimes both are required to be present in the contract to make it enforceable. By Form we may be taken to mean some peculiar solemnity attaching to the expression of Agreement which of itself gives efficacy to the contract; by Consideration some gain to the party making the promise, arising from the act or forbearance, given or promised, of the promisee.

History of the matter.

In English, as in Roman, law, Form, during the infancy of the system, is the most important ingredient in Contract. Consideration is an idea which, though not unknown, is at any rate imperfectly developed. It would not be desirable here to enter upon an antiquarian discussion, which is nevertheless of considerable interest. It is enough to say that English law, and also, we may venture to say, Roman law,

Common features in history of

starts with two distinct conceptions of Contract. *30 Roman and English law. One is, that Form of a certain kind will make any promise binding; the other is, that the acceptance of benefits of a certain kind will imply such a promise to repay them as the law will enforce. The theory that the Roman Contracts developed out of Conveyance in an order of moral progression seems to rest on no sure evidence; and there is reason to believe that the *Stipulatio*, or solemn promise elicited by a formal question, and the informal contract *Re*, which arose from the lending or deposit of money, or goods, were the most ancient of the contracts known to Roman law. See App. A. At any rate, in English law, we find that before the end of the thirteenth century two kinds of contract were enforceable: one Formal, the contract under seal, answering to the *Stipulatio*; one informal, arising from sale and delivery of goods, loan of money, and the like, in which the consideration had been executed upon one side, and an implied or expressed promise to repay would support an action of Debt. Except in these limited cases, the idea of enforcing an informal promise, simply because a benefit was accruing or was about to accrue to the promisor by the act or forbearance of the promisee, does not appear to have been entertained before the middle or end of the fifteenth century.

The Formal Contract of English law is the *Contract under Seal*. In no other way than by the use of this Form could validity be given to executory contracts, until the doctrine of consideration began to make way. We have to bear in mind that it is the Form which makes this contract binding; the *consensus* of the parties has not emerged from the ceremonies which surround its expression. Courts of Law will not trouble themselves with the intentions of parties who have not couched their agreement in the solemn Form to which the law attaches legal consequences. Nor, on the other

hand, where Form is present will they ask for
*31 further evidence as to intention. Later on,
owing in a great measure we suspect to the influence
of the Court of Chancery, the intention of the parties
begins to engage the attention of the Courts,
and the idea of the importance of Form undergoes a
curious change. When a contract comes before the Courts,
evidence is required that it expresses the genuine
intention of the parties; and this evidence is found
either in the solemnities of the Contract under Seal,
or in the presence of Consideration, that is to say,
in some benefit to the promisor or loss to the promisee,
granted or incurred by the latter in return
for the promise of the former. Gradually Consideration
comes to be regarded as the important ingredient
in Contract, and then the solemnity of a deed is said
to make a contract binding because it "imports considera-
tion," though in truth it is the Form which,
apart from any question of consideration, carries with it legal consequences.

Before considering in detail the classes of contract
which English law recognizes, it is well to conclude
the historical outline of the subject of Form and Consideration.

We have stated that the only contracts which English law originally recognized, were the Formal contract under Seal, and the informal contract in which Consideration was executed upon one side. How then do we arrive at the modern breadth of doctrine that any promise based upon Consideration is binding upon the promisor? This question resolves itself into two others. How did informal executory contracts become actionable at all? How did Consideration become the universal test of their actionability?

To answer the first question we must look at the remedies which, in the early history of our law, were open to persons complaining of the breach of a prom-

ise, express or implied. The only actions of this nature, during the thirteenth and fourteenth centuries were the actions of Covenant, of Debt and of Detinue. Covenant lay for breach of promises made under seal: Debt for liquidated or ascertained claims, arising either from breach of covenant, or from non-^{*32} payment of a sum certain due for goods supplied, work done, or money lent: Detinue¹ lay for the recovery of specific chattels kept back by the defendant from the plaintiff. These were the only remedies based upon contract. An executory agreement, therefore, unless made under seal, was remediless.

The remedy by which such promises were eventually enforced is a curious instance of the shifts and turns by which practical convenience evades technical rules. The breach of an executory contract, until quite recent times, gave rise to a form of the action of Trespass on the case.

This was a development of the action of Trespass: Spence, Trespass lay for injuries resulting from immediate violence: Trespass on the case lay for the consequences of a wrongfull act, and proved a remedy of a very extensive and flexible character.

This action came to be applied to contract in the following way: It lay originally for a malfeasance, or the doing an act which was wrongful *ab initio*: it next was applied to misfeasance, or improper conduct in doing what it was not otherwise wrongful to do, and in this form it applied to promises part-performed and then abandoned or negligently executed to the detriment of the promisee: finally, and not without some

¹ The Court of Appeal has very recently decided that the action of Detinue is founded in *tort*, *Bryant v. Herbert*. But though the wrongful detention of goods is the cause of action, the remedy may apply to cases in which the possession of the goods originated in the contract of Bailment. [See judgment of BRETT, L. J., at p. 392.]

resistance on the part of the Courts, it came to be applied to a non-feasance, or neglect to do what one was bound to do. In this form it adapted itself to Pollock, 128. executory contracts. The first reported attempt so to apply it was in the reign of Henry IV., when a carpenter was sued for a non-feasance because he had undertaken, *quare assumpsisset*, to build a house and had made default. The judges in that case held that the action, if any, must be in covenant, and it *33 did not appear that the promise was under seal.

Reasons for its extension. But in course of time the desire of the King's Bench to extend its jurisdiction, the fear that the Common Pleas might develop the action of Debt to meet the case of executory promises, or that the Court of Chancery might extend its extraordinary powers, and by means of the doctrine of consideration, which it had already applied to the transfer of interests in land, enlarge its jurisdiction over contract, operated to produce a change in the attitude of the Common Law Courts. Before the end of the reign of Henry VII. it was settled that the form of Trespass on the case known henceforth as the action of Assumpsit would lie for the non-feasance, or non-performance of an executory contract; and the form of writ by which this action was commenced, continued to perpetuate this peculiar aspect of a breach of a promise until recent enactments for the simplification of procedure.

It is not at all improbable that the very difficulty of obtaining a remedy for breach of an executory contract led in the end to the breadth and simplicity of the law as it stands at present. If the special actions *ex contractu* had been developed to meet purely executory informal engagements, they would probably have been applied only to engagements of a particular sort, and a class of contracts similar to the consensual contracts of Roman law, privileged to be informal, might have been protected by the courts, as exceptions to the

general Rule that Form or executed Consideration was needed to support a promise.

But the conception that the breach of a promise was something akin to a wrong, the fact that it could be remedied only by a form of action which was originally applicable to wrongs, had a somewhat peculiar result. The cause of action was the non-feasance of that which one had undertaken to do, not the breach of a particular kind of contract; it was therefore of universal application. Thus all promises would become binding, and English law was saved the technicalities which must needs arise from a classification of contracts. Where all promises may be actionable, it follows that there must be some universal test of actionability, and this test was supplied by the doctrine of Consideration.

It is no easy matter to say how Consideration came to form the basis upon which the validity of informal promises might rest. It is sufficient for the purpose of the present work to say that the idea of Consideration, or a "*quid pro quo*" as it is styled in some of the early reports, was probably borrowed by the Common Law Courts from the Chancery.

For the Chancellor was in the habit of enquiring into the intentions of the parties beyond the Form, or even in the absence of the Form in which, by the rules of Common Law, that intention should be displayed, and he would find evidence of the meaning of men in the practical results to them of their acts or promises. It was thus that in the region of conveyance, the Covenant to stand seized and the Bargain and Sale of Lands came to be enforced in the Chancery before the Statute of Uses, and the doctrine once applied to simple contract was found to be of great practical convenience. When a promise came before the Courts they asked no more than this, "Was the party making the promise to gain anything from the promisee, or was the prom-

Gradual growth of doctrine.

isee to sustain any detriment in return for the promise?" if so, there was a "*quid pro quo*" for the promise, and an action might be maintained for the breach of it.

So silent was the development of the doctrine that Consideration was the universal requisite of contracts not under seal, and so marked was the absence of any express authority for the rule in its broad and simple application, that Lord MANSFIELD was able in the middle of the last century to raise the question whether,

in the case of commercial contracts made in writing, there was any necessity for Consideration to support the promise. In the case of *Pillans v. Van Mierop* he held, and the rest of the Court of

- 8 Burr. 1072. King's Bench concurred with him, that the custom of merchants would give efficacy to a written promise for which no consideration could be shown. The case was decided on another point, and the doctrine was emphatically disclaimed in the opinion of the judges delivered not long afterwards in the House of Lords, in
7 T. R. 850. [See Cook v. Bradley, 7 Conn. 57.] *Rann v. Hughes*; but the question raised serves to show that the breadth of the law upon this subject was, until comparatively recent times, hardly realized by those who had to administer it.

CLASSIFICATION OF CONTRACTS.

*86

There is but one Formal Contract in English law, Contracts are Formal or Simple. the Deed or Contract under seal; all others are simple contracts depending for their validity upon the presence of Consideration. The Legislature has, however, imposed upon some of these simple contracts the necessity of some kind of Form, and these stand in an intermediate position between the *Deed* to which its Form alone gives legal force, and the *Simple Contract* which rests upon Consideration and is free from the imposition of any Statutory Form. In addition to these a certain class of Obligation has been imported into the Law of Contract under the title of Contracts of Record, and though these obligations are wanting in the principal features of Contract, it is necessary, in deference to established authority, to treat of them here.

The Contracts known to English Law may then be divided thus:—

- | | | | |
|---|---|------------------------------|--|
| <p>A. <i>Formal.</i></p> <p>i. e. dependent for their validity upon their Form</p> | } | Classification of contracts. | <p>1. Contracts of Record.</p> <p>2. Contracts under Seal.</p> |
| <p>B. <i>Simple.</i></p> <p>i. e. dependent for their validity upon the presence of Consideration.</p> | | | <p>3. Contracts required by law to be in some form other than under Seal.</p> <p>4. Contracts for which no form is required.</p> |

It will be best to deal first with the essentially formal contracts, then with those forms which are superimposed upon simple contracts, and then with Consideration, the requisite common to all simple Contracts.

*37

FORMAL CONTRACT.

§ 1. *Contracts of Record.*

Contracts of Record. The obligations which are styled Contracts of Record are Judgment, Recognizance, Statutes Merchant and Staple, and Recognizances in the nature or Statute Staple.

(1) Judgment. And first as to Judgment. The proceedings of Courts of Record are entered upon parchment rolls, and upon these an entry is made of the judgment in an action when that judgment is final. A judgment awarding a sum of money to one of two litigants, either by way of damages or for costs, lays an obligation upon the other to pay the sum awarded. This obligation may come into existence as the final result of litigation when the Court pronounces judgment, or it may be created by agreement between the parties before litigation has commenced, or during its continuance. In such cases the obligation results from a contract for the making of which certain formalities are required; this contract is either a *warrant of attorney*, by which one party gives authority to the other to enter judgment upon terms settled, or a *cognovit actionem*, by which the one party acknowledges the right of the other in respect of the pending dispute and then gives a similar authority.

How it originates. Its characteristics. The characteristics of an obligation of this nature may be shortly stated as follows:

1 Its terms admit of no dispute, but are conclusively proved by production of the record.

2. So soon as it is created the previously existing rights with which it deals merge or are extinguished in it: for instance, A sues X for breach of contract or for civil injury: judgment is entered in favor of A either by consent or after trial: A has no further

rights in respect of his cause of action, he only becomes creditor of X for the sum awarded.

3. The creditor, as we may conveniently call the party in whose favor judgment is given, has *38 certain advantages which an ordinary creditor does not possess. He has a double remedy for his debt; he can take out execution upon the judgment and so obtain directly the sum awarded, and he can also bring an action for the non-fulfillment of the obligation. For this purpose the judgment not only of a Court of Record, but of any Court of competent jurisdiction, British or foreign, is treated as creating & W. 628. an obligation upon which an action may be brought for money due.

Recognizances have been aptly described as “con- (2) Recogni-
tracts made with the Crown in its judicial capacity.” zance.

A recognizance is a writing acknowledged by the party to it before a judge or officer having authority for the purpose, and enrolled in a Court of Record. It may be a promise, with penalties for the breach of it, to keep the peace, or to appear at the assizes.

Statutes Merchant and Staple and Recognizances in (3) Statutes the nature of a Statute Staple are chiefly of interest merchant and staple. to the student of the history of Real Property Law. They have long since become obsolete, but they were once important, inasmuch as they were acknowledgments of debt which, when made in accordance with Statutory provisions and enrolled of Record, created a charge upon the lands of the debtor.

It will easily be seen how little there is of the true nature of a contract in the so-called Contracts of Record. *Judgments* are obligations dependent for their binding force, not on the consent of the parties, but upon their direct promulgation by the sovereign authority acting in its judicial capacity. *Recognizances* are promises made to the sovereign with whom, both by the technical rules of English Law *39

and upon the theories of Jurisprudence, the subject cannot contract. (a) Statutes Merchant and Staple share the characteristics of judgment. We may therefore dismiss these obligations altogether from our consideration.

§ 2. *Contract under Seal.*

Contract
under seal.

The only true Formal Contract of English law is the *Contract under Seal*, sometimes also called a Deed and sometimes a specialty. It is the only true *Formal Contract*, because it derives its validity from its Form alone, and not from the fact of agreement, nor from the consideration which may exist for the promise of either party. It will be convenient in dealing with the contract under seal to consider (1) how it is made; (2) what are its chief characteristics as distinguished from simple contracts; (3) under what circumstances it is necessary to contract under seal.

How made.
Sheppard,
Touchstone,
53.

(1) A deed must be in writing or printed on paper or parchment. It is often said to be executed, or made conclusive as between the parties, by being "signed, sealed and delivered." Of these three the signature is a matter as to the necessity of which there is some doubt, though no one, unless ambitious of giving his name to a leading case, would omit to sign a deed. (b) But that which identifies a party to a deed with the

Couch v.
Goodman, 3
Q. B. 597.

(a) [In this country recognizances are usually given in criminal cases. They are generally taken in open court, and no suit is necessary upon a breach of the condition. A judgment of forfeiture is rendered, and if there are sureties, the usual process for collecting the penalty is by issuing a writ of *scire facias* to show cause why execution should not issue on the judgment of forfeiture.]

(b) [All sealed instruments which are required by the provisions of the *Statute of Frauds* to be in writing, must be signed, either by the party to be charged or his authorized agent.]

execution of it is the presence of his *seal*, (a) that sealed, which makes the deed operative, so far as he is concerned, is the fact of its *delivery* by him. Delivery is Delivered, effected either by actually handing the deed to the other party to it, or to a stranger for his benefit, or by words indicating an intention that the deed should become operative though it is retained in the possession of the party executing. In the execution of a deed under *Xenos v. Wickham*,^{295.} ordinary circumstances, seals are affixed beforehand, *L R 2 H. L* and the party executing the deed signs his name,^{296.} places his finger on the seal intended for him, and utters the words "I deliver this as my act and *40 deed." Thus he at once identifies himself with the seal, and indicates his intention to deliver, that is, to give operation to the deed.

A deed may be delivered subject to a condition, it Escrow, then does not take effect until the condition is performed: during this period it is termed an *escrow*, but immediately upon the fulfillment of the condition it becomes operative and acquires the character of a deed. *Shepp. Touch. 59.*
(b) There is an old rule that a deed, thus conditionally delivered, must not be delivered to another party to it, else it takes effect at once, on the ground that a

(a) [By statute in most States, a scroll, either written or printed, stands for a seal, and in a few States the distinction between sealed and unsealed instruments has been abolished.]

(b) [There seems to be some conflict of authority as to the rights of an innocent purchaser who buys land, when a deed placed in the hands of a third party to hold as an escrow, is delivered by him to the grantor without a compliance with the conditions. The Circuit Court of the United States for the District of Indiana, in the recent case of *Bailey v. Crim.* 8 Reporter, 455, held that the case was within the principle that when one of two innocent parties does some act by which he places it in the power of a third party to deceive and injure the other, the negligent one should suffer rather than the other.

But the Supreme Court of Wisconsin, in *Hovarts v. Agnes*, 4 Wis., 343, holds that no title passes by the fraudulent act of the depositary, and that a *bona fide* purchaser is not protected as against the grantor.]

Hudson v.
Kewett, 5
Bing. 68.

Indenture
and deed
poll.

delivery in fact outweighs verbal conditions. But the modern cases appear to show that this technical rule will not be adhered to, if the intention of the parties is clear that the deed should be delivered conditionally. (a)

The distinction between a *Deed poll* and an *Indenture* is no longer important since 8 and 9 Vict. c. 106. s. 5. Formerly a deed made by one party had a polled or smooth-cut edge, a deed made between two or more parties was copied for each on the same parchment, and the copies cut apart with indented edges, so as to enable them to be identified by fitting the parts together. Such deeds were called *Indentures*. The statute above mentioned provides that an indented edge shall not be necessary to give the effect of an *Indenture* to a deed purporting to be such. (b)

Characteris-
tics of con-
tract under
seal.'

(2) A contract under seal differs from a simple contract in many ways.

(a) *Estoppel.* (a) Statements made in a simple contract, though strong evidence against the parties to the contract, are not absolutely conclusive against them. Statements made in a deed are absolutely conclusive against the parties to the deed in any legal proceedings between them taken upon the deed. "The principle is that where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any mat-

Per Tannton,
J., in Bow-
man v. Tay-
lor, 2 A. & E.
278.

(a) [The following cases support the old English rule: *Miller v. Fletcher*, 27 Gratt. (Va.) 403; *Duncan v. Pope*, 47 Ga. 445; *Foley v. Cowgill*, 5 Blackf. (Ind.) 18; *Badcock v. Steadman*, 1 Root, 87; *Braman v. Bingham*, 26 N. Y. 483; *Graves v. Tucker*, 10 Sm. & M. (Miss.) 9; *Gibson v. Partee*, 2 Dev. and Bat. L. (N. Car.) 530; *Hagood v. Harley*, 8 Rich. L. (S. Car.) 825. But see *Cram v. Hutchison*, 8 Bradwell, (App. Ct. Ill.) 30.]

(b) [It is not necessary that a deed be actually indented to make it an indenture. It is sufficient if it purports on its face to be an indenture. *Currie v. Donald*, 2 Wash. (U. S. C. C.), 58.]

ter he has so asserted." Such a prohibition to deny facts is termed an *estoppel*. (a)

(b) Where two parties have made a simple contract (b) Merger, for any purpose, and afterwards have entered into an identical engagement by deed, the simple contract is merged in the deed and becomes extinct. This extinction of a lesser in a higher security, like the extinction of a lesser in a greater interest in lands, is called merger.

(c) A right of action arising out of simple contract (c) Limitation of is barred if not exercised within six years. actions.

A right of action arising out of a contract under seal is barred if not exercised within twenty years. (b)

These general statements must be taken with some See Part V. ch. iii. qualifications to be discussed hereafter.

(d) Remedies have been and are possessed by the (d) Remedies against creditor by deed against the estate of the debtor, debtor's which are not possessed by the creditor of a simple estate. contract debt, and which mark the importance attached to the formal contract. In administering the personal estate of a testator or intestate person, creditors by speciality were entitled to a priority over creditors by simple contract. Their privilege in this respect is taken away by 32 & 33 Vict. c. 46.

As regards the real estate of a debtor, the creditor by speciality was also preferred. If the debtor bound himself and his heirs by deed, the Common Law gave to the creditor a right to have his debt satisfied by the heir out of the lands of his ancestor; the liability thus

(a) [The estoppel in a deed extends to its recitals. *Stowe v. Wyee*, 7 Conn. 214; *Jackson v. Parkhurst*, 9 Wend. (N. Y.) 209; *Carver v. Jackson*, 4 Pet. (U. S. S. C.) 1.]

But the recital of the amount or kind of consideration may be contradicted by parol if the explanation does not defeat the operation of the deed. *MCrea v. Purmort*, 16 Wend. (N. Y.) 460; *White v. Miller*, 22 Vt. 380; *Wilkinson v. Scott*, 17 Mass. 249; *Pritchard v. Brown*, 4 N. H. 397.]

(b) [This depends upon the statutes of the various States.]

imposed on the heir was extended to the devisee by 3 & 4 Will. & Mary, c. 14 s. 2. This statute was repealed by 11 Geo. IV. & 1 Will. IV. c. 47, only for the purpose of extending the creditor's remedy to some cases not provided for by the previous Act. During the present century, however, creditors by simple contract have also acquired a right to have their debts satisfied out of the lands of the *42 debtor; but it should be noted that the creditor by speciality can claim against heir or devisee of real estate without the intervention of the Court of Chancery, the creditor by simple contract must get the estate administered in Chancery in order to make good his claim. When the estate is so administered the creditor by speciality has, since 32 & 33 Vict. c. 46, no priority over the simple contract creditor, whether it be realty or whether it be personalty that is administered by the Court. (a)

(e) *Gratuitous promise under seal is binding.*

(e) A gratuitous promise, or promise for which the promisor obtains no consideration present or future, is binding if made under seal, is absolutely void if made verbally, or in writing not under seal. It has already been mentioned that this characteristic of contracts under seal is often accounted for on the ground that their solemnity imports consideration, and that this supposition is historically untrue, inasmuch as it is the Form alone which gives effect to the deed. The doctrine of Consideration is, as we have seen, of a much later date than that at which the Contract under Seal was in full efficacy, an efficacy which it owed entirely to its Form. And the doctrine of Consideration, as it has developed, has steadily tended to limit

(a) [The remedies for the enforcement of speciality debts are governed by the statutes of the different States, but the tendency of those statutes is to abolish the priority in favor of speciality debts over debts by simple contract, when the speciality is not a lien upon property.]

the peculiarity of the Contract under Seal with which we are now dealing, and to introduce exceptions to the general rule that a gratuitous promise made by deed is binding. (a)

Even at Common Law, in the case of contracts made in restraint of trade, consideration is necessary, though Ma'llan v. the contract be under seal; and although this instance May, 11 M. & W. 665. is exceptional, yet if there be a consideration for a [See Palmer Stubbins, 3 contract under seal, it is open to the party sued upon Pick. 188.] such a contract to show that the consideration was Collins v. illegal, or immoral, in which case the deed will be Blantern, 1 Sm. L. C. p. void. 369.

But it is in the Court of Chancery that we find this privilege most encroached upon. The idea of Consideration as a necessary element of Contract as well as of Conveyance, if it did not actually originate in the Chancery, has always met with peculiar *43 favor there. It was by the weight given to the presence of Consideration, or by inferences drawn from its absence, that the Covenant to stand seized, the Bargain and Sale of lands, and the resulting Use first acquired validity. And in the department of Equitable Contract, Equity has developed similar principles. It will not extend its peculiar remedies to gratuitous promises, even though they be under seal. *Specific* See part V. performance of a gratuitous promise is therefore un-enforceable, whether the promise is or is not made by deed. And further, Equity not merely refuses to compel specific performance of a gratuitous promise though made by deed, but it looks behind the Form and endeavors to ascertain, where Consideration is absent, whether the consent of the parties was genuine or not; that is to say, it is ready to regard the absence of Consideration as evidence of Undue Influence.

(a) [In many of the States a plea of want or failure of consideration is allowed in suits on instruments under seal for the payment of money or property.]

ence or Fraud; upon sufficient proof of these it will altogether avoid the deed.

Bonds.

The best illustration of a gratuitous promise under seal is supplied by a *Bond*. A Bond may be technically described as a promise defeasible upon condition subsequent; that is to say, it is a promise by A to pay a sum of money, which promise is liable to be defeated by a performance by A of a condition stated in the bond. The promise, in fact, imposes a penalty for the non-performance of the condition which is the real object of the bond. The condition desired to be secured may be the payment of a sum of money or the doing or forbearing from some act. In the first case the instrument is called a common money bond; in the second a bond with special conditions.

A promises X that on the ensuing Christmas Day he will pay to X £500, with a condition that if before that day he has paid to X £250 the bond is to be void.

A promises X that on the ensuing Christmas Day he will pay to X £500, with a condition that if before that day M has faithfully performed certain duties the bond is to be void.

Legal aspect #44 Common law has differed from Equity in its treatment of bonds much as it did in its treatment of mortgages.

Equitable aspect

Common law took the Contract in its literal sense and enforced the fulfillment of the entire promise upon breach of the Condition.

Equity looked to the object which the bond was intended to secure, and would retain the promisee from obtaining more than the amount of money due under the condition or the damages which accrued to him by its breach.

S & S Will. The rights of the promisee are now limited by stat-

ute to the amount of loss actually sustained by breach III. C. 11; 4 & 5 Anne, C. 16; 23 & 24

(3) As a general rule it is optional to the parties to Vict. C. 126. a contract to employ or not to employ the form of a deed. But there are a few cases in which a deed is essential to the validity of a contract.

The Common Law rules on this subject are important. They are two. Common law requirements.

(a) A gratuitous promise or contract for which there is no consideration must be made by deed, otherwise it will be void. This matter has already been dealt with as furnishing a distinguishing characteristic of Formal as opposed to simple Contracts.

(b) As to contracts made with corporations, the Contract general rule on this subject is, that a corporation ^{with corporation} aggregate can only be bound by contracts under the seal of the corporation. The reason assigned for the rule is that, as a corporation is only a *45 fictitious and not a natural person, some evidence is required that the aggregate of persons composing it is really bound to that which the contract purports to promise. This evidence is supplied by the use of the seal common to the corporation. There are, however, numerous exceptions to the general rule, exceptions which may be classified under two heads, as (1) cases in which the rule would defeat the objects for which the corporation was created, and (2) cases in which the operation of the rule would occasion great and constant inconvenience.

The first head applies more particularly to *trading* corporations, which as the law now stands may through South of Ireland Colliery Co. v. Wm. L. die, L. R. 3 C. P. 469.

(a) [Although the English statutes referred to are of a later date than that of the settlement of this country, the rule given in the text is adopted almost unanimously in the various States either by statute or usage. See *Buckmaster v. Grundy*, 1 Scam. (Ill.) 310; *Moss v. Wood*, R. M. Charlton, (Ga.) 42; *Hopkins v. Towell*, 5 Yerg. (Tenn.) 805.]

their agents enter into simple contracts relating to the objects and purposes for which the body was incorporated; and if these objects make it expressly necessary, may even issue negotiable instruments.

The second head applies more particularly to non-trading cases, and may be taken to include:

Nicholson v. Brabfield Union. L. R. 1 Q. B. 620. Matters of trifling importance or daily necessary occurrence, as the hire of an inferior servant, or the supply of coals to a workhouse.

Matters of urgent necessity, admitting of no delay; as where a municipal corporation possessed a dock and made agreements from time to time for the admission of ships, it was held that such agreements need not be under seal. **Wells v. The Mayor of Kingston upon Hull.**

In addition to these exceptions at Common Law, the Legislature has in some cases freed corporations from the necessity of contracting under seal, and provided special forms in which they may express their common assent.

It has been questioned whether, when a corporation enters into a contract not under seal, and the contract has been executed in part, such execution gives rights to the parties which they would not have possessed if the contract had remained executory. It seems *46 that where a corporation has done all that it was bound to do under a simple contract it may sue the other party for a non-performance of his part—

5 M. & G. R. Fishmonger's Company v. Robertson; but that the mere fact that something has been done under the contract will not make it actionable, if it is not made under seal, unless the contract be of a nature to admit of an action for specific performance. (*a*)

9 Ex. 24;

Hunt v. Wimbledon

(*a*) [In the United States, where no form is prescribed by the Local Board, charter, a corporation may contract in the same manner as an individual. **Bank v. Poitiaux**, 8 Rand. (Va.) 136; **Selma v. Muller**, 46 Ala. 411; **Bank of Columbia v. Patterson**, 7 Cranch. (U. S.

†:

SIMPLE CONTRACT.

§ 3. *Simple Contracts required to be in writing.*

We have now dealt with the contract which acquires Simple ^{contracts.} validity by reason of its Form alone, and we pass to the Contract which depends for its validity upon the presence of Consideration. In other words, we pass from the Formal to the Simple Contract, or from the ^{All require consideration.} Contract under seal to the *parol* Contract, so called because, with certain exceptions to which reference will now be made, it can be entered into by word of mouth.

In the case of certain Simple Contracts the law re-^{Some are required in addition to}quires written evidence of the nature of the agree-^{ment and of the parties to it, in order to make it be expressed in certain form.}ment and of the parties to it, in order to make it enforceable; but Form is here needed, not as giving efficacy to the contract, but as evidence of its existence. Consideration is here as necessary as in those cases in which no writing is required: "if contracts [See post, p. 62. Quegley v. Mase, 15 La. Ann. 197.] be merely written and not specialties, they are parol and consideration must be proved."

We are now dealing with Simple Contracts, which must fulfill the ordinary requirements of Simple Contracts; but in addition to this the law demands that written evidence of a certain kind shall be produced concerning them, otherwise the courts will not regard or enforce them.

The only requirement of Form in Simple Contract Common Law which can be said to exist at Common Law is in the case of Bills of Exchange and Promissory *47

S. C.) 299; *Carrol v. Knapp*, 9 Pet. (U. S. S. C.) 541; *Canal Bridge Gordon*, 1 Pick. (Mass.) 297. And even when they are granted the privilege of acting in a specific manner, this does not prevent them from acting in any other way not prohibited. *Witte v. Derby Fishing Co.*, 2 Conn. 260.]

Notes, which by the custom of merchants, adopted into the Common Law, must be in writing.

The statutory requirements of Form in Simple Contract are mainly to be found in the 29 Car. II. c. 3, the famous Statute of Frauds. There are some others, however, and we may deal with them shortly.

[Rev. Stat. U.
S., Sec. 4955.]

Lindley on
Partnership,
i. 703.

Statute of
Frauds.

Section 4.

Assignments of copyright must be in writing.

The transfer of shares in a company is usually required to be in a certain form by the statutes of the various States which govern companies generally, or refer to particular companies.

The Statute of Frauds, 29 Car. II. c. 3, contains two sections, the 4th and 17, which affect the form of certain Simple Contracts and which require careful consideration. The 4th Section enacts: "That *no action shall be brought* whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person upon any agreement made in consideration of marriage, or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

*48 The discussion of these sections falls naturally into three heads.

- (1) The form required by the section.
- (2) The nature of the contracts specified in it.
- (3) The effect upon such contracts of a breach of its provisions.

(1)

The form required by the terms of the section is the first point to be considered. What is meant by the requirement that "the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or by some other person thereunto by him lawfully authorized"?

We may, with regard to this part of the subject, lay down the following rules:¹

(a) The Form required does not go to the existence of the Contract. The Contract exists though it may not be clothed with the necessary Form, and the effect of this departure from the provisions of the statute is simply that no action can be brought until the omission is made good.

Thus the memorandum or note in writing may be made, so as to satisfy the statute, at any time between the formation of the contract and the commencement of an action.

So too a party to the contract may sign a rough draft of its terms, and acknowledge his signature when the draft has been corrected and the contract is actually concluded. *Stewart v. Eddowes*. Or again, a proposal containing the names of the parties, and the terms of the suggested contract, and signed by the proposer will bind him though the contract is concluded by a subsequent parol acceptance. *Reuss v. Picksley*. L. R. 1 Exch. 342. [Fenly v. Stewart, 5 Sanf. 101.] In the former of these two cases the signature of the party charged — in the latter not the signature only but the entire memorandum — was made *49 before the contract was concluded. This is perhaps sufficient to show that the Form is an evidentiary

¹ With the exception of rules (a) and (d), what is said under this head may be taken to apply to the 17th as well as to the 4th section.

mitter only, and is not, as in the case of a deed, an integral part of the contract itself.

The parties must appear.

2 E. & E.
349. [Sher-
burne v.
Shaw, 1 N.
H. 157.]

(b) The memorandum of the contract must show who are the parties to it. For instance, A promised X that he would answer for the debt or default of M; the memorandum of the promise, though signed by A, did not contain the name of X. It was held to be insufficient. *Williams v. Lake*. "No document," it was said in that case, "can be an agreement or a memorandum of one which does not show on its face who the parties making the agreement are."

Trueman v.
Loder, 11 A.
& E. 539.

Higgins v.
Senior, 8 M.
& W. 834.
[Waring v.
Mason, 18
Wend. 425.]

The terms
may be col-
lected from
various doc-
uments;

It is settled, however, that a description of one of the contracting parties, though he be not named, will let in parol evidence otherwise inadmissible to show his identity. This may occur where A as agent for M enters into a contract with X in his own name; X may prove that he has really contracted with M, who has been described in the memorandum in the character of A. (a)

On the other hand, A is not permitted to prove that he is not the real party to the contract. (c) The memorandum may consist in various letters or papers, but they must be *connected, consistent* and *complete*.

(c) [The American cases seem to be in conflict upon this point. The Courts of Massachusetts in *Lerner v. Johns*, 9 Allen, 419, overruling some former cases, hold the rule as laid down in the text, as do those of Kentucky in *Violett v. Powell*, 10 B. Monroe, 847, while those of New York, in *Minard v. Mead*, 7 Wend. 68; *Newcomb v. Clark*, 1 Denio, 226, hold that parol evidence cannot be received to prove that where a party signs his own name he did so as agent for another. The language of the opinion in *Hypes v. Griffin*, 89 Ill. 184, seems to uphold the view of the Massachusetts cases, though not necessary to the decision. Where the contract has been executed so that the suit need not be on the writing, the unnamed principal may be sued — *Huntingdon v. Knox*, 7 Cush. (Mass.) 871 — and the unnamed principal may maintain an action upon a written instrument made by an agent in his own name. *Hubbert v. Borden*, 6 Wheat. 79; *Brooks v. Mintern*, 1 Cal. 481.]

The only signature required is that of the party to *Dobell v. Hutchinson*,
be charged: it is not therefore the *fact* of agreement, 3 A. & E.
but the terms, and all the terms, of the agreement 355; *Buxton v. Rust*, L.
that the statute requires to be expressed in writing. R. 7, Ex.

The terms need not all be expressed in the same document, and it is permissible to prove a memorandum from several papers, or from a correspondence, but the connection of the various terms must be made out from the papers themselves, and may not be shown by parol evidence. [Farwell v. Matther, 10 Allen 322.]

A issued a prospectus of Illustrations of Shakespeare, to be published on terms of subscription there-
in set out. X entered his name in a book entitled "Shakespeare Subscribers, their signatures," in A's shop. X afterwards refused to subscribe. He was sued upon his promise to do so, and it was held that there was no documentary evidence to connect the subscription book with the prospectus, so as to make a sufficient memorandum of the contract, and that the deficiency might not be made good by parol evidence. *Boydell v. Drummond*.

To say that the terms of the contract must be consistent with one another is merely to reiterate what has been said under the head of proposal and acceptance. But although the various documents in which the terms of a contract are found must be perfectly consistent with one another, yet if the contract is fully set out in writing it will not be affected by a repudiation of it contained in the same writing; the parties have agreed, and the statutory evidence is supplied: a repudiation is not within the power of either to make, 843. [Barry and its expression is wholly nugatory. *Bailey v. 1 Pet. 640.*] *Sweeting*.

Again, the terms must be complete in writing. Where a contract does not fall within the statute, the parties may either (1) put their contract into writing, (2) contract only by parol, or (3) put some of the terms

in writing and arrange others by parol. In the latter case, although that which is written may not be varied by parol evidence, yet the terms arranged by parol are proved by parol, and they then supplement the writing, and so form one entire contract. But where a contract falls within the statute, all its terms must be in writing, and parol evidence of terms not appearing in the writing would altogether invalidate the contract, as showing that it was something other than that which appeared in the written memorandum.

[*Fowler v. Heulican*,
52 Ill. 405.]

Consideration must appear in writing.

Wain v. Warlters, 5 East, p. 10.

Signature of party or agent.

See Benjamin on Sales. (Am. Ed. chap. 8.)

(d) The consideration must appear in writing as well as the terms of the promise sued upon. (a) This rule does not extend to the 17th section, but it has been settled with regard to the 4th since the year 1804.

*51 (e) The memorandum must be signed by the party charged or his agent.

It does not follow therefore that the contract is enforceable at the suit of either party; it may be optional to the party who has not signed to enforce it against the party who has. The signature need not be an actual subscription of the party's name, it may be a mark; nor need it be in writing, it may be printed or stamped; nor need it be placed at the end of the document, it may be at the beginning or in the middle.

(a) [While the courts of New York uphold the English rule, the weight of authority seems to be strongly upon the other side. See *Packard v. Richardson*, 17 Mass. 123, where the subject is very fully discussed; also, *Sage v. Wilcox*, 6 Conn. 81; *Reed v. Evans*, 17 Ohio, 128; *Gilligan v. Boardman*, 20 Me. 79; *Silkins v. Watson*, 12 Tex. 199; *Hou v. Kimball*, 2 McLean, (U. S. C. C.) 103. Some of the cases are based upon the substitution of the word "contract" or "promise," instead of the word "agreement," which is used in the English statute. Where the courts hold the English rule it is held to be sufficient if the consideration can be deduced from the whole contract, and that the words "value received" are sufficient. *Watson v. McLaren*, 19 Wend. (N. Y.) 557; *Edden v. Gough*, 5 Gill. (Md.) 101.]

But it must be intended to be a signature, and as such to be a recognition of the contract, and it must govern the entire contract.

These rules are established by a number of cases turning upon difficult questions of evidence and construction. The principal cases are elaborately set forth in Benjamin on Sales, pp. 188-196, but a further discussion of them would here be out of place.

Similar questions arise in dealing with the subject of agency in relation to the signature of contracts; but without going into detail it may suffice to lay down these rules. If A signs a contract professing himself to be the agent for X it is a question of fact whether he was or was not authorized by X to do so. If A signs a contract on behalf of X, but without stating that he signs it as an agent, the other party to the contract has the option of enforcing it against A or X; but A having held himself out as a principal is bound by the contract if the other party choose to enforce it against him, and he will not be allowed to prove that he signed only as an agent. Certain classes of persons are presumed by law to be agents for both parties, and their signature is binding on both unless the presumption be rebutted by contrary evidence. Such persons are auctioneers at a public sale, and brokers.

See chapter on Agency.
Higgins v. Senior, 8 M. & W. 834.
*52 [Waring v. Mason, 18 Wend. 425.]

(2)

Having dealt with the form required under the 4th section for all the contracts included therein, it will be well to note briefly the characteristics of the five sorts of contract specified in the section.

Special promise by an executor or administrator to answer damages out of his own estate.

The liabilities of an executor or administrator in respect of the estate of a deceased person are of two

kinds. At Common Law he may sue and be sued upon obligations devolving upon him as representative of the deceased. In Equity he may be compelled to carry out the directions of the deceased in respect of legacies, or to give effect to the rules of law relating to the division of the estate of an intestate. In neither case is he bound to pay anything out of his own pocket: his liabilities are limited by the assets of the deceased. But if, in order to save the credit of the deceased, or for any other reason, he choose to promise to answer damages out of his own estate, that promise must be in writing together with the consideration for it, and must be signed by him or his agent. It is almost needless to add that in this, as in all other contracts under the section, the presence of writing will not atone for the absence of consideration.

Any promise to answer for the debt, default or miscarriage of another person.

Without entering upon a detailed discussion of the contract of suretyship, it is well to note the following points relating to the promise to which the statute applies.

The promise
differs from
indemnity.

(a) It must be distinguished from an indemnity, or promise to save another harmless from the results of a transaction into which he enters at the instance of the promisor.

*53 In other words, there must be three parties in contemplation; M, who is actually or prospectively liable to X, and A, who in consideration of some act or forbearance on the part of X promises to answer for the debt, default, or miscarriage of M.

18 C. B. N. S. An illustration is furnished by the case of *Reader v. Kingham*. X, a bailiff, was about to arrest M. A promised to pay a sum of £17 on a given day to X if he would forbear to arrest M. This was held an inde-

pendent promise of indemnity from A to X which need not be in writing.

(b) There must be a liability actual or prospective ^{Necessitates} of a third party for whom the promisor undertakes to ^{primary liability of} answer. If the promisor make himself primarily liable the promise is not within the statute.

"If two come to a shop and one buys, and the other, to gain him credit, promises the seller '*If he does not pay you, I will,*' this is a collateral undertaking and void without writing by the Statute of Frauds. But ^{in Birkinbyr v. Darnell, 1 Sm. L. C. 310. [Hartley v. Var-} if he says, '*Let him have the goods, I will be your paymaster,*' or '*I will see you paid,*' this is an under-taking as for himself, and he shall be intended to ^{88 Ill. 501.]} be the very buyer and the other to act as but his servant."

(c) Although the liability may be prospective at the time the promise is made, yet it must come into existence at some time, else the contract of suretyship falls to the ground, and the promise, though not in writing, will nevertheless be actionable. "There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship." ^{Per Lord Selborne in Mount Stephen v. Lakeman, L. R. 7 H. L. 17; and see judgment in Exch. Cham. L. R. 7 Q. B. 202.}

(d) If there be an existing debt for which a third party is liable to the promisee, and if the promisor undertake to be answerable for it, still the contract need not be in writing if its terms are such that it affects an extinguishment of the original liability. In other words, the liability of the third party must be a continuing liability in order to bring the promise within the statute. A promise to a creditor to pay a debt in consideration of his doing that which would extinguish his claims against the original debtor, would be an illustration of the kind of promise here spoken of. *Godman v. Chase.* ^{1 B. & Ald. 297. [Curtis v. Brown, 5 Cush. 488.]}

May arise from wrong. (e) The debt, default, or miscarriage spoken of in the statute will include liabilities arising out of wrong as well as out of contract. So in *Kirkham v. Marter*, M wrongfully rode the horse of X without his leave, and killed it. A promised to pay X a certain sum in consideration of his forbearing to sue M. Held to be within the meaning of the statute.
 2 B. & Ald. 613. [Turner v. Hubbell, 2 Day 457.]

Consideration need not be expressed. (f) This contract is an exception to the general rule that "the agreement or some memorandum or note thereof," which the statute requires to be in writing, must contain the consideration as well as the promise.
 See p. 51.

Agreement made in consideration of Marriage.

Not a promise to marry. It is sufficient to note that the agreement here meant is not the promise to marry, (the consideration for this is the promise of the other party,) but the promise to make a payment of money or a settlement of property in consideration of, or conditional upon a marriage actually taking place.
 [Clark v. Pendleton, 20 Conn. 495.]

Contract or sale of lands or hereditaments, or any interest in or concerning them.

What is an interest in land. It is not always easy to say what is an interest in land within the meaning of this section, but it is perhaps safe to say that the contract must be for a substantial interest in land, and not for arrangements preliminary to the acquisition of an interest, or for a remote and inappreciable interest.

An agreement to pay costs of an investigation
 *55 of title would not be within the operation of the section; nor would an agreement to transfer shares in a railway company which, though it possesses land, does not give any appreciable interest in that land to its individual shareholders. The whole

subject is one which belongs to the sale and purchase of Real Property rather than to the law of Contract.

The principal question of interest with special reference to the subject relates to the sale of crops. A distinction has been drawn as to these between what are called emblements or *fructus industrielles*, and growing grass, timber, or fruit upon trees, which are called *fructus naturales*.

Fructus industrielles do not under any circumstances constitute an interest in land. *Fructus naturales* are considered to do so if the sale contemplates the passing of the property in them before they are severed from the soil. Where property is to pass after severance, both classes of crops are goods, wares, and merchandise within the meaning of section 17 of the Statute of Frauds; but where property in *fructus industrielles* is intended to pass before severance, it is See Ben. doubtful whether they fall within the meaning of section 17, though it is certain that the sale is not governed by section 4. [See Whitmarsh v. Walker, 1 Met 313; Rabe v. Osborn, 67 Ill. 103.]

Agreement not to be performed within the space of one year from the making thereof.

Two points should be noted with regard to this form of agreement.

(a) In order to fall within the section the parties must contemplate that it should not be performed within the year. The fact that it may not be, or is not performed within the year does not bring it within the operation of the statute unless "it appears Peter v. Compton, 1 by the whole tenor of the agreement that it is to be performed after the year." [Lyon v. King, 11 Met. 411.]

(b) The agreement does not fall within the section if that which one of the parties is to do, is all to be done within the year. So where A being tenant to X under a lease of twenty years, promised verbally to pay an additional £5 a year during

Donellan v. Read. 3 B. & Ad 899. [Holbrook v. Armstrong, 1 Fairl. 81.] the remainder of the term in consideration that X laid out £50 in alteration, A was held liable upon his promise, the consideration for it having been executed within the year.

(3)

It remains to consider what is the position of parties who have entered into a contract specified in section 4, but have not complied with its provisions. The terms of the section do not render such a contract void, but they prevent it being enforced by action. The contract, therefore, though it cannot be sued upon, is yet available for some purposes. Two illustrations will suffice to explain this.

13 C. B. 801.
[*'contra*, see
Denny v.
Williams, 5
Allen 1;
Dacosta v.
Davis, 4
Zabr. (N.J.)
819.]

In the case of *Leroux v. Brown*, the plaintiff sued upon a contract not to be performed within the year, made in France and not reduced to writing. French law does not require writing in such a case, and by the rules of private international law the validity of a contract, so far as regards its formation, is determined by the *lex loci contractus*. The procedure, however, in trying the rights of parties under a contract, is governed by the *lex fori*, and the mode of proof would thus depend on the law of the country where action was brought. If, therefore, the 4th section avoided contracts made in breach of it, the plaintiff could have recovered, for his contract was good in France, where it was made, and the *lex loci contractus* would have been applicable. If, on the other hand, the 4th section affected procedure only, the contract, though not void, was incapable of proof. The plaintiff tried to show that his contract was void by English law, in which case he would have been successful, for there would have then been nothing to hinder his proving first the contract and then the French law which made it valid. But the Court of Common Pleas held that the 4th section dealt with procedure only, that the

existence of the contract was not affected by *57 the section, but that it was rendered incapable of proof, and the plaintiff therefore could not recover.

For some purposes, therefore, the contract is in existence, and if one party should do all that he is bound to do under the contract, equity will consider that such part performance takes it out of the operation of the statute, and will grant specific performance of the residue. (a) "It is every day's practice in the courts Honyman of equity to enforce the performance of contracts not ^{arguendo in} Le Roux v. in writing where there has been part performance." Brown.

So in *Nunn v. Fabian*. A landlord agreed by word L. R. 1 Ch. of mouth with his tenant to grant him a lease for 21^{35.} years at an increased rent upon certain terms. The landlord died before the lease was executed, but the tenant had previously paid a quarter's rent at the increased rate. It was held that he was entitled to an execution of the lease on the ground that a part performance had taken place, although the contract would otherwise have been unenforceable as not satisfying the Statute of Frauds. (b)

Contracts within the seventeenth section.

The seventeenth section enacts "that no contract for Section 17. the sale of any goods, wares and merchandises for the

(a) [The Courts of Connecticut and Missouri uphold the English rule. See *Noyes v. Moor*, 1 Root, 142; *Watrous v. Chalker*, 7 Conn. 224, and *Suggett v. Cason*, 26 Mo. 221. But a number of courts hold the opposite doctrine. See *Lane v. Shackford*, 5 N. H. 130; *Thomas v. Dickerson*, 14 Barb. 90.]

(b) (Some American cases hold that verbal contracts for the sale of lands will not be enforced in equity unless the purchaser has taken possession under the contract, paid the purchase money, and made valuable improvements. *Updike v. Armstrong*, 8 Scam. 564; *Granger v. Fry*, 17 Penn. St. 491. But see *Lovory v. Teal*, 3 Barb. Chy. (N. Y.) 407; *Rhodes v. Rhodes*, 3 Sunf. Chy. (N. Y.) 279; *Early v. Caldwell*, 5 Day, (Conn.) 67, and *Fitzsimmons v. Allen*, 39 Ill. 440, where a more relaxed rule is upheld.)

price of £10 sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

The same questions present themselves here as presented themselves under the fourth section. (1) What is the form required, (2) what are the contracts for which such form is required, and (3) what are the effects of the absence of the statutory requirements.

*58

(1)

Difference as to form from Sec. 4 With regard to the form required, where, in absence of a part acceptance and receipt or part payment, a note or memorandum in writing is resorted to, it is sufficient to say that the rules applicable to contracts under section 4 apply to contracts under section 17, with this exception, that it is not necessary under section 17 that the consideration for the sale should appear in writing. Since the 17th section only applies to contracts for the sale of goods, it will be presumed, in the absence of a specified consideration for the sale, that there is a promise or undertaking to pay a reasonable price, provided always that there has been no express verbal agreement as to price which would rebut the presumption of a promise to pay what was reasonable.

Hoadley v. M. Laine, 10 Bing. 482.

(2)

Nature of Contract of Sale.

The question as to the nature of a contract for the sale of goods, wares, and merchandise can only be answered by a discussion on the Contract of Sale in English law which would not be in place here.

These points however must be borne in mind.

The contract of Sale in English law has the effect of a conveyance, it passes the property in the thing sold; but in order to have this effect, it must be a contract for the sale of a specific chattel to which nothing remains to be done by the vendor by way of completion, weighing, measuring, or testing. Such a contract [Handletter v. Tallman, 14 Maine 400.] is called an *executed* contract of sale.

It is quite possible, however, that a contract may be made for the sale of goods which are not specific—A may agree to buy any 10 sheep of X's flock. Or A orders a table which he sees making in X's shop. Or of goods to which something remains to be done by way of ascertainment of price—A buys X's stack of hay, the price to be determined as the hay is taken down and weighed. *59

In these cases the property does not pass, the buyer does not acquire a right *in rem* to the thing agreed to be sold, but only a right *in personam* against the seller. (a) In like manner, the seller holds at his own risk the chattels sold, he is not divested of his property. This is called an *executory* contract of sale.

It was long questioned whether the 17th section applied to the executory contract of sale, and the matter was not set at rest till more than 150 years after the passing of the Statute of Frauds. (b)

The effect of s. 7, ch. 14 of Lord Tenterden's Act, 9 Geo. IV., is to bring executory contracts for the sale of goods within the 17th Section of the Statute of Frauds.

A further question has arisen, in cases where skilled

(a) (But if it is shown that it was the intent of the parties that the property should pass, some courts hold that the intention shall govern. *Riddle v. Vurnum*, 20 Pick. 280. But see *contra*, *Waldo v. Belcher*, 11 Iredell, L. 609.)

(b) (The American courts hold that executory contracts are within the statute. *Bennett v. Hall*, 10 Johns. (N. Y.) 864; *Lamb v. Crofts*, 12 Met. (Mass.) 353; *Curson v. Chealy*, 6 Ga. 554; *Sauyer v. Ware*, 36 Ala. 675.)

Difference between contracts of sale and labor. labor has to be expended upon the thing sold before the contract is executed and the property transferred, and for work whether the contract is one for work and labor, which would not fall under the 17th section; or for goods, wares, and merchandise within the meaning of the section. After some conflict of judicial opinion it has

1 B. & S. 272. been laid down in *Lee v. Giffin* that where the *60 contract is "such that a chattel is ultimately to be delivered by the plaintiff to the defendant, when it has been sent, then the cause of action is goods sold and delivered," (per CROMPTON, J.) And BLACKBURN said, "If the work and labor be bestowed in such a manner as that the result would not be anything which would properly be the subject of sale, then an action for work and labor is the proper remedy. . . . I do not think that the relative value of the labor and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been none the less for the sale of a chattel." (a)

(3)

It remains to note that if there be no acceptance and receipt, no part payment, and no memorandum or note in writing of a sale falling within the section, the effect of the section is to avoid the contract altogether, and not merely, as in the case of the 4th section, to bar the remedy of the party wishing to enforce the contract.

(a) (It is not probable that the doctrine of the text would be upheld by the American courts, but that they would hold that if work is to be done on an article it would not be a sale but a contract for labor, and not within the statute. *Hight v. Ripley*, 19 Me. 137; *Crookshank v. Burrell*, 18 Johns. (N. Y.) 58; *Mixer v. Howarth*, 21 Pick. (Mass.) 205.)

As we are here dealing with the Form of contracts it is not necessary or desirable to speak of acceptance, receipt, and part payment, for these are strictly part of a separate subject, the formation of a special contract —the Contract of Sale.



*61

§ 4. CONSIDERATION.

Consideration has already been touched upon so far as regards the history of the doctrine in English law, and it has been stated that it is the universal requisite of contracts not under seal. What has now to be said must therefore be understood to apply to those contracts the discussion of which has just been concluded, those contracts which, though not under seal, are required by law to be expressed in certain forms.

Definition of consideration. It will be well perhaps to take some general definition of consideration which may serve to explain in outline what it is which we are now proposing to discuss, and then to lay down certain principles upon which the doctrine has been dealt with in English law. The fullest definition of consideration is that given by the Court of Exchequer Chamber in *Currie v. Misa*.

**L. R. 10
Exch. 162.
[Train v.
Gold, 5 Pick.
880.]** “A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.”

Such being the definition of consideration, we may proceed to state:

General rules as to consideration.

1. That consideration is necessary to the validity of every promise not under seal.
2. That Courts of law *will not* inquire whether the consideration is adequate to the promise, but *will* insist that it should be something of some value in the eye of the law.
3. That consideration must be legal.

4. That consideration may be present or future, *62
executed or executory, but must not be past.

1. *Consideration is necessary to the validity of every Consideration necessary to every simple contract.*

The peculiar case of *Pillans v. Van Mierop* has already been noticed, and it will be remembered that³ *Burr. 1863.* Lord MANSFIELD, C. J., and WILMOT, J., there expressed Doubt as to an opinion that, among merchants, a promise put in writing was binding without consideration. That case was decided in 1765; and not many years afterwards, in 1778, a somewhat similar point arose in the case of *Rann v. Hughes.* There the defendant, as administratrix of the estate of one J. Hughes, promised in writing "to answer damages out of her own estate." There was no consideration for the promise, and it was contended that the writing required by 29 Car. II., c. 3, s. 4 rendered consideration unnecessary. The view encouraged by Lord MANSFIELD in *Pillans v. Van Mierop*³ *Burr. 1863.* appears to have been, that the presence of consideration was one mode among others for supplying evidence of the intention of the parties to form a contract; and that if the terms of the contract were reduced to writing either by reason of commercial custom or of statutory enactment, that evidence was sufficient without consideration. But this view of the law was, once for all, declared to be incorrect by SKYNNER, C. B., delivering the opinions of the judges in the House of Lords in *Rann v. Hughes.*

"It is undoubtedly true that every man is, by the law of nature, bound to fulfill his engagements. It is [Cook v. Bradley, 7 Conn. 57.] equally true that the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such agreement is 'nudum pactum ex quo non oritur actio,' and whatever may be the sense of this maxim in the civil law, it is in the last sense

[*Stahler v. Cowman, / Gill. & J. (Md.) 284.*]

*63 only that it is to be understood in our law. All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol; nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing. *If they be merely written and not specialties, they are parol and a consideration must be proved."*

Bills of exchange and promissory notes no real exception.

Bills of exchange and promissory notes are an apparent but not a real exception to the universality of this rule. In contracts of this nature consideration is presumed to exist and need not be proved by the plaintiff. The burden of proof rests on the party disputing the validity of the contract. If, however, he can show that, as between himself and the party suing, no consideration was given for the making or endorsement of the bill or note, the promise fails, as it would do in any other case of simple contract under like circumstances. [But the rule is different where a party gives a note to another as an accommodation, to enable him to raise money by sale or discount. In that case the maker cannot defend upon the ground that no consideration passed between the maker and payer, if the note is sued on by an indorser who paid value for the note, even if he knew of the fact that it was given as accommodation paper. The payment of the money to the indorser is a sufficient consideration to charge the maker.] (a)

Consideration need not be adequate, but must be real.

2. *Courts of law will not inquire whether or not the consideration be adequate to the promise, but they will insist that it be something of some value in the eye of the law.* In other words, the consideration need not be adequate, but must be real.

(a) [*City Bank of Columbus v. Beach*, 1 Blatchf. (U. S. C. C.) 438; *Molson v. Havoley*, Ib. 409; *Perry v. Crammond*, 1 Wash. C. C. 100; *Kitchell v. Schenk*, 29 N. Y. 515; *Marr v. Johnson*, 9 Terg. (Tenn.) 1.]

So long as a man gets what he has bargained for, courts of law will not ask what its value may be to him, or whether its value is in any way proportionate to his act or promise given in return. This would be "the law making the bargain, instead of leaving the Per Alder. parties to make it." Further than this, they will not son, B. in ask whether the thing which forms the consideration v. Scott, 15 Pilkington does in fact benefit the promisor, or a third party, or M. & W. 880. [Law. is of any substantial value to any one. It is enough rence v. Mc- that something is promised, done, forborne, or suffered Calmont, 3 How. 426.] by the party to whom the promise is made, as consid- Adequacy of sideration for the promise made to him. consideration.

The following case will illustrate this principle: *64

A and X were both subscribers to a charity. Bolton v. The objects of the charity were elected by the sub- Madden, L. scribers, and each subscriber possessed votes propor- R. 9 Q. B. 53. tionate to the amounts of his subscription. A and X agreed that if at the next election A would give 28 votes to a candidate favored by X, X would at the suc- ceeding election give 28 votes to a candidate favored by A. A fulfilled his promise, but X when called on to vote for A's candidate declined to do so. A there- upon increased his subscription to such an extent as would give him 28 additional votes, and sued X for the amount he had thus been compelled to pay.

It was argued that the promises of A and X were no consideration for one another, inasmuch as a man must be supposed to give his votes to the candidate whom he thought the best; and that if A did so he sustained no detriment. But the court appears to have thought that as a subscriber to a charity may give his votes as he pleases, so the limitation of the choice of each promisee formed an appreciable consideration, and laid it down that "the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced."

10 A. & E.
303.

A stronger authority is the case of *Haigh v. Brooks*. The defendant in that case promised payment of certain bills accepted by M in consideration that the plaintiff would return to the defendant a guarantee which he had given for the payment of £10,000 by M to the plaintiff. The guarantee was returned: it then turned out to be unenforceable under 29 Car. II., c. 3, s. 4, and the defendant argued that it was therefore no consideration for his promise. Lord DENMAN, however, in giving judgment for the plaintiff, said, "Whether or no the guarantee could have been available within the doctrine of *Wain v. Warlters* the plaintiff's were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded: he may have had other motives and objects, and of their weight he was the only judge."

Inadequacy
of considera-
tion in
equity.

Equity so far takes adequacy of consideration into account in dealing with contracts, that if a contract is sought to be avoided on the ground of Fraud or Undue influence, inadequacy of consideration will be regarded as strong corroborative evidence in support of the suit. It has even been held that inadequacy of consideration is a ground upon which specific performance may be resisted. But in spite of some conflict of judicial opinion upon this point, it is probably safe to adopt the view of Lord ELTON, that mere inadequacy of consideration, unless so gross as "to shock the conscience and amount in itself to conclusive evidence of fraud,"

Coles v.
Trecottwick,
9 Ves. 284.

is not alone a sufficient ground for refusing specific performance. (a)

Although Courts of Law will not inquire into the Consideration must be the adequacy of consideration, they will insist that it real. should not be illusory or unreal. At first sight this looks like saying that a consideration must be a consideration; but it may not be useless to inquire into some of the various forms which consideration may assume, and to note the grounds upon which certain alleged considerations have been held to be of no real value in the eye of the law.

The consideration of a promise may be an act or a Consideration is an forbearance, or a promise to do or to forbear. act, forbear-

When a promise is given for a promise the contract is said to be made upon an executory consideration; the obligations created by it rest equally upon both parties; each is bound to a future act. The *66 simplest illustration of such a contract is the case of mutual promises to marry, in which the consideration for A's promise to marry X is X's promise to marry A, while A's promise forms in like manner the consideration for X's.

When the consideration for a promise is an act or forbearance, the contract is said to be made upon consideration executed. This arises when either the offer or the acceptance is signified by one of the parties doing all that he is bound to do under the contract so created. The validity of consideration, as regards its relation to the promise in time, may be discussed presently. We are at present concerned with the *nature* of consideration, and will note some of its aspects which are worth observation.

Where the consideration for a promise is a promise, Contingent the whole contract may be contingent and may never contracts.

(a) [See *Osgood v. Franklin*, 2 Johns. Chy. 28; *Follett v. Rose*, 8 McLean, C. C. 312; *Robinson v. Schly*, 6 Ga. 515.]

come into effect save at the will of one of the parties. For instance A offers X to supply at a certain price such goods as X may choose to order. X accepts this offer. If X calls upon A to supply goods on the terms fixed, A cannot refuse to do so on the ground that X is not bound to order any goods at all. The contract may be put in this form: In consideration that X promises to pay A a certain price for his goods if he requires them, A promises to supply goods at that price if called upon to do so.¹

G. N. Rail-way Co. v. Witham, L. R. 9 C. P. 16.

The peculiarity of the case just cited consists in the option given to one of the parties to bring the contract

¹ It is noticeable that BRETT, J., in his judgment in the case cited in the text, leaves it uncertain whether he regards the contract as based upon mutual promises dependent upon a contingency for their coming into effect, or whether he rests it upon an outstanding offer to supply goods which each successive order accepts and so turns into a contract *pro tanto*. Mr. Leake, ed. 2, p. 46, takes the latter view.

[The facts of the case and the language of the judges would seem to leave no doubt that the opinion of Mr. Leake is the correct one, and that the case does not bear out the text. The plaintiff had advertised for bids for supplies, and the defendant had sent in a bid, in which he offered to furnish them at a certain price, if wanted by plaintiff. The plaintiff had sent two orders, which had been filled by defendant, and plaintiff ordered a third lot, which defendant refused to supply at the agreed rates, and it was held that plaintiff was entitled to recover; but two of the judges expressly say that they do not mean to hold that the defendant would have been liable if he had notified plaintiff that he would furnish no more before he had received the last order. The American cases which hold that an offer may be rescinded at any time before it has been accepted are not in any way in conflict with the case cited. See *Craig v. Harper*, 8 Cush. (Mass.) 158. It is true that there might be a contingent contract, in which one party would be bound and the other not; as if A should agree to sell B from 700 to 1,000 bushels of corn, and B should agree to take what he wished to sell, which should be not less than the 700 nor more than the 1,000 bushels. In this case, while A would only be required to furnish the smaller sum, yet B could be compelled to take the larger or pay the damages if he refused to take it all. See *Disborough v. Neilson*, 3 Johns. Cases, (N. Y.) 81.]

into operation, or to leave it dormant irrespective of the wishes of the other. But the consideration is not altogether illusory. The promisee need *67 not bring the contract into effect at all, but if he do so, he is bound by its terms as to price.

Similar in character are the considerations which consist in conditional promises. A promises to do something for reward, but X only binds himself to pay for it upon the happening of an event which may not be under the control of either party. Such would be the case in a building contract, where the promise to pay for work to be done is made conditional on the certified approval of an architect. Or again, the promise may be conditional on something not happening; such are the promises in a charter party which are not to take effect if certain specified risks occur.

In the one case the promise depends upon a condition precedent, in the other it is liable to be defeated by a condition subsequent: in neither case does its contingent or conditional character prevent it from forming a good consideration for promises given in return.

The abandonment of a right, or a promise to forbear from exercising it, is good consideration for a promise. Forbearance. The right may be legal or equitable, certain or doubtful; it may exist against the promisor, or against a third party. But the right foreborne or agreed to be foreborne must at least be doubtful; forbearance to enforce an unenforceable claim can be no consideration for a promise. The case of *Jones v. Ashburnham* is an illustration of this principle. There the plaintiff sued on a promise to pay money, the consideration being a promise by him not to sue for a debt due from a third party who had died leaving no assets. "How," said Lord ELLENBOROUGH, "does the plaintiff show any damage to himself by forbearing to sue, when there was no fund which could be the object of suit, where it does not appear that any person *in rerum natura*

was liable to him? No right can exist in this vague, abstract way."

Compro-
mise of suits.

The commonest form in which a forbearance appears as consideration for a promise is in the compromise of an action. A the plaintiff promises X the defendant that in consideration of certain things to be done by X he will forbear to prosecute his suit; and this is good consideration for the act or promise by X. But here, in order to make the forbearance a consideration, the plaintiff must believe in his case. In *Wade v. Simeon*, the plaintiff sued upon [McKinley v. Watkins, 18 Ill. 140.] a promise by the defendant to pay £2,000, with interest and costs, in consideration of the abandonment by the plaintiff of an action brought to recover that sum. It appeared, from the mode in which the case came before the Court, that the plaintiff admitted that he knew he had originally no cause of action in respect of the £2,000. And TINDAL, C. J., said:

"It is almost *contra bonos mores*, and certainly contrary to all the principles of natural justice, that a man should institute legal proceedings against another when he is conscious that he has no cause of action. In order to show a binding promise the plaintiff must show a good consideration, something beneficial to the defendant or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be if he has no cause of action, and beneficial to the defendant it cannot be, for in contemplation of law the defense upon such an admitted state of facts must be successful; and the defendant will recover costs, which must be assumed to be full compensation for all the legal damage he sustains. The consideration therefore altogether fails."

It is not necessary that the plaintiff should have a good case, but he must believe that he has a case, and must intend *bona fide* to maintain it by action. If he does so, the fact that he has in truth no cause of action, and that the defendant knows that he has none,

will not invalidate a compromise, whether made before or after the commencement of litigation. Where a man was threatened with legal proceedings because the plaintiff believed that he was liable, and he, though he knew that he was not liable, gave promissory notes to avoid being sued, he was held to be bound by his promise. The plaintiff had abandoned a *69 claim which he believed to be enforceable and meant to try and enforce: the defendant escaped the inconvenience and anxieties of litigation, and the compromise was deemed to be a sufficient consideration for the notes. *Cook v. Wright.*

1 B & S. 553.

[*Blake v.*

Peck, 11 Vt.

483.]

Questions have been raised as to the length of time over which a forbearance to sue must extend in order to constitute a consideration. It has even been held that a promise of forbearance for an unspecified time was no consideration, as in *Seemple v. Pink.* But it may now be regarded as settled that a promise of forbearance, in order to form a consideration, need not be a promise of absolute forbearance, nor even of forbearance for a definite time; where no time is mentioned, a reasonable time will be implied, *Oldershaw v. King,* 2 H. & N. 517. [Clark v. Russel¹, 3 "staying of the hand of the creditor" is consideration Watts, 213.] and where no express promise is made, an actual authority for this proposition is the case of *Leask v. Scott.* The most recent L. R. 2 Q. B. D. 376. [See *Mecorney v. Stanley,* 8 *Cush.* 85.]

The defendants were vendors of a cargo of nuts. X, the purchaser of the cargo, was indebted in large sums to the plaintiffs, and, on applying for a further advance, he was told that it could only be made if he would promise to give cover, *i. e.*, security. X promised cover, received an advance, and some days after deposited with the plaintiff, among other securities, the bill of lading for the cargo of nuts. X became insolvent, and the defendants sought to stop the nuts *in transitu.* The right of stoppage *in transitu* cannot be exercised

against the transferee of a bill of lading for consideration. It was urged for the defendants that the consideration in this case was past, being the advance made some days previous to the assignment of the bill of lading: but the Court of Appeal held that there was a present consideration for the assignment. "An action would lie for not covering. Therefore the assignor for such a consideration as this always gets

the benefit of performing his contract and so
*70 saving himself from a cause of action." The
consideration for the assignment of the bill of
lading was in effect a forbearance to sue for an indefinite
and unspecified time: the assignment being part
performance of a contract on which action might be
brought at any time, "it stayed the hand of the
creditor."¹

Bailment.

Among cases where an act is the consideration for a promise, it is worth while to notice the kind of contract which arises upon the mere placing or leaving of property in the hands of a bailee or depositary. This will create an implied promise to use reasonable care in the safe custody of the property, and will support an express promise to undertake certain services in respect of it. Thus, where A allowed two bills of exchange to remain in the hands of X, and X promised to get

¹ The case cited, though a good illustration of forbearance as a consideration, is by no means free from difficulty. If "the creditor" was entitled to an immediate performance of the promise to give cover, the debtor, in endorsing to him the bill of lading, did no more than he was legally bound to do. If this be so, there was no consideration for the forbearance, and the whole of the contract, in which the forbearance is the consideration for the assignment of the bill of lading, seems to fall to pieces. It might have seemed a more simple solution of the difficulty to have regarded the performance of the promise to give cover as a part of the consideration for the advance, for although it took place as a matter of fact on a later day, it was substantially part of the same transaction.

the bills discounted and to pay the money to A's account, this promise was held to be made upon good consideration, namely the permission given to the defendant to retain the bills. *Hart v. Miles.*

4 C. B. N. S.

371. [Rob-

inson v.
Thompson

Threadgill,
13 Lead I

13
39

To discuss further the forms which consideration ^{in so far as} may assume would be to enter upon an analysis of the possible subjects of contract. An attempt has been made to point out some of the forms which best illustrate the nature of consideration in general; it remains to point out certain semblances of consideration which the Courts have refused to allow to support a promise. They may be said to fall, roughly speaking, under three heads.

(a) Cases in which motive has been confounded *71(a) Motive with consideration, that is to say, cases where a man has promised to do a thing, not for any benefit to himself, but because he wished it to be done or thought that it ought to be done.

(b) Cases in which the alleged consideration has been a promise to do a thing obviously impossible in fact or in law; or a promise the performance of which, from its vague and illusory character, it is impossible to secure.

(c) Cases in which the alleged consideration has been the doing or promising to do what a man was already bound to do, so that the promisor got nothing but what he was already entitled to get before the consideration was offered.

(a) Cases have arisen which make it necessary to (a) Motive. distinguish motive from consideration. "Motive is Patterson, J., not the same thing with consideration, consideration ⁱⁿ Thomas v. Thomas, means something which is of some value in the eye of the law, moving from the plaintiff." The confusion between motive and consideration has taken two forms; the distinction which once existed between *good* and *valuable* consideration; and the view once maintained [Philpot v. Greeniger, 12 Wall. 570.]

that a moral obligation was sufficient to support a promise.

Good consideration. The first of these probably originated in the Chancery, where a covenant to stand seized was held (before 27 Hen. VIII. the Statute of Uses) to raise a use, if the person in c. 10.

In the case of covenant to stand seized. whose favor the covenant was made stood within a certain degree of consanguinity to the covenantor. Such relationship was of itself a consideration for the covenant, and blood or *good* consideration came to be distinguished from *money* or valuable consideration which supported the use arising from Bargain and Sale. At the present day, although a covenant to stand seized would, by virtue of the Statute of Uses, create a legal estate, an estate cognizable by the Common Law Divisions of the High Court, the consideration of *blood* or *good* consideration is still required to support the covenant.

As applied to contract. *72 In some early cases it was attempted to extend this principle to the law of contract. The mere existence of natural affection as a motive for a promise

Bret. v. J. S. and wife, 1 Cro. 735. was never held to amount to a consideration: "natural affection is not sufficient to raise an assumpsit without [Kirkpatrick v. Taylor, 43 Ill. 207.] that where A made a binding promise to X to do something for the benefit of X's son or daughter, the

Dutton v. Poole, 2 Lev. 210. nearness of relationship would entitle the person in whose favor the contract was made to sue upon it.

This however is no longer law. Nearness of relationship to one of two contracting parties, and the fact that the contract was made for the benefit of the plaintiff, give no cause of action if the plaintiff was no party to the contract. (a)

(a) [In this country the decided weight of authority is in opposition to the text and in favor of the doctrine that when a simple contract is made by two parties for the benefit of a third, the person for whose benefit it was made can maintain the suit for its violation. *Bristow v. Lane*, 21 Ill. 194; *Lawrence v. Fox*,

The point is connected rather with the effect of a contract, than with the nature of consideration, but it serves to illustrate the form which the doctrine of *good* consideration took in the Common Law Courts, and to explain the saying quoted above, that consideration *must move from the plaintiff*. The phrase means no more than this, that when a man sues upon a promise he must show that the consideration for which the promise was made was some benefit conferred or detriment sustained by himself; in other words, that strangers to a contract acquire no right to sue upon it simply because they are interested in its performance.

Moral obligation, under certain aspects, was once regarded as a consideration for a promise. A man may believe himself to be under a moral obligation either because he has received actual benefits in the past, or from motives of piety, delicacy, or friendship. Now a past consideration is in truth no consideration at all, inasmuch as the promisor does not receive either a benefit, or the prospect of a benefit, in return for his promise. There are certain cases however in which an advantage derived in the past will support a subsequent promise. These shall be dealt with when we come to draw the distinction between executed and past consideration. It is sufficient to say here that the validity of such promises will be found to rest upon another basis than that of moral obligation, and that the phrase, which was of common use in the Common Law Courts at the end of the last and beginning of the present century, has had an unhappy and obscuring influence upon this branch of the

*73 See p. 93.

20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 175; *Twitchell v. Mears*, (U. S. C. C. N. Dist. Ill.) 6 Reporter, 40; *Urquart v. Brayton*, (Sup. Ct. R. I.) 18 Alb. Law Jour., 871; *Brice v. King*, 1 Head. (Tenn.) 152; *Felton v. Dickerson*, 10 Mass. 287; *Mason v. Hall*, 30 Ala. 509; *Allen v. Thomas*, 8 Metc. (Ky.) 198; *Bohanan v. Pope*, 42 Me. 93; *Crampton v. Ballard*, 10 Vt. 251.]

11 A. & E.
438. [Ehle v.
Judson, 24
Wend. 97.] law of contract. The question was settled once for all in the case of *Eastwood v. Kenyon*, and a final blow given to the doctrine that past benefits would support a subsequent promise on the ground of the moral obligation which rested on the promisor. "The doctrine," said Lord Denman, "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."

Arising from If the actual receipt of a benefit in the past does **honorable or** not constitute consideration for a subsequent promise, **consci-^{ous}ntious** still less will such duties of honor, conscience or friend-ship as a man may conceive to be incumbent on him. A man may be said to be morally bound to support his children in a manner suited to his own condition

Mortimore v. and expenditure, but the law creates no such obliga-tion, and it is conceived that a promise by a father to **R. v. Downes,** his son to pay the son's debt would not be binding. (*a*)
L. R. 1 Q. B. D. 24. A man is bound in honor to pay money lost in a wager,
8 & 9 Vict. c. but inasmuch as the law has declared wagers to be void,
100, s. 18. a promise to pay such a debt would be unenforceable for want of consideration: and in like manner a pious wish on the part of the executors to carry out what

Patterson, J., they knew to be the intentions of the testator, affords **in Thomas v.** no consideration for a promise made by them for such **Thomas, 2 Q. B.** B. 851. an object.

Indian Con- It is worth noting that the Indian Contract Act, in tract **Act, s.** dealing with this subject, differs from the rule of 25. English law in two particulars. It upholds promises made in consideration of natural love and affection where the parties are nearly related and the promise

(a) [The weight of authorities in this country uphold the doc-trine of the text. See *Miles v. Wyman*, 8 Pickering, 207; *Cook v. Bradley*, 7 Conn. 57; *Shepherd v. Rhodes*, 7 R. I. 470; *Cobb v. Cowdery*, 40 Vt. 25; *Updike v. Titus*, 18 N. J. Eq. 151. But, see *Montgomery v. Lampton*, 8 Metc. (Ky.) 519; *Musser v. Ferguson*, 55 Pa. St. 475; *Commissioners v. Perry*, 5 Ohio, 58.]

written and registered. It also upholds informal promises to make compensation to persons who have already conferred some benefit upon the ^{*74} promisor, or voluntarily done something which the promisor was legally compellable to do. It thus recognizes the motives of natural affection (subject to certain forms,) and gratitude as forming consideration for a promise.

In French law, *cause*, the equivalent for consideration, has a yet wider meaning; it includes not merely motives of gratitude, but sentiments of honor and *Dalloz*, *Re-scruples of conscience*. It may, however be regarded, ^{pertoire, vol. 23, p. 152.} as certain that, in English law, motive, whether it take the form of natural affection, gratitude for past services, feelings of honor or piety, is in no case such consideration as will support a simple contract.

(b) Courts of law will also hold a consideration to ^{Impossibility and vagueness.} be unreal if it be impossible upon the face of it, or so vague in its terms as to be practically impossible to enforce.

In dealing with impossibility regarded from this point of view, we must guard against being understood to mean anything more than a *prima facie* legal im- ^{Per Brett, J.} possibility, or a thing physically impossible "accord- ^{Clifford v. Watts, L. R.} ing to the state of knowledge of the day." *Practical 5. C. P.* 577. impossibility unknown to the parties when they entered into their contract may avoid it on the ground of Mistake. Impossibility of performance arising subsequent to the making of the contract may under certain circumstances operate as a Discharge. But we are here concerned with promises to do a thing so obviously impossible that the promise can form no real consideration.

For a legal impossibility we may take the case of *2 Lev. 161. Harvey v. Gibbons*. There the plaintiff was bailiff to J. S. and the defendant was debtor to J. S. to the amount

of £20. The defendant in consideration that the plaintiff would discharge him the £20 due to J. S. promised to lay out £10 on a barge of the plaintiff.

*75 The Court held that the consideration was "illegal," for a servant cannot discharge a debt due to his master. By illegal we must understand legally impossible, for illegality, in the strict sense of the term, there was none.

Of contracts void because the consideration for the promise involves the physical impossibility we can furnish no decided case. Gaius gives us as good an illustration as any: "*Si quis rem quae in rerum natura non est aut esse non potest velut hippocentaurum stipuletur, inutilis est stipulatio.*" (a) The Indian Contract Act supplies another.

Ind. Cont. Act, s. 56. A agrees with X to discover treasure by magic. The agreement is void.

Vagueness. Again, a consideration may be unreal on the ground of impossibility where it is a promise so vague as to be virtually unenforceable. The case of *White v. Bluett* exemplifies this rule. This was an action brought by executors upon a promissory note made payable to the testator by his son, the defendant in the action. The son pleaded a promise made by his father to discharge him from all liability in respect of the note in consideration of his ceasing to make certain complaints, which he had been in the habit of making, to the effect that he had not enjoyed as many advantages as the other children. It was said by the Court that the promise given by the son was no more than a promise "not to bore his father," and was too vague to support the father's promise to discharge the son from liability on the note. "A man might com-

23 L. J.
Exch. 30.

Per Parke, B. than a promise "not to bore his father," and was too vague to support the father's promise to discharge the son from liability on the note. "A man might com-

(a) "If one should make a contract concerning a thing which neither does nor can exist, as, for instance, a hippocentaur, the contract is invalid."

plain that another person used the highway more than he ought to do, and that other might say ‘do not complain and I will give you £5.’ It is ridiculous to suppose that such a promise could be binding.”

Per Bullock,
C. B.

(c) Another form of unreality of consideration has arisen where the alleged consideration is the promising to do what a man is bound to do by law to do for the promisor. The promisee thus gets nothing more than he is already bound by law to do for the promisor. [Reynolds v. Nugent, 25 Ind. 328.] Entitled to. Thus where in the course of a voyage from London to the Baltic and back two seamen deserted, and the captain, being unable to supply their place, promised the rest of the crew that if they would work the vessel home the wages of the two deserters should be divided among them, this promise was held not to be binding. “The agreement,” said Lord ELLENBOROUGH, “is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under the emergencies of the voyage. . . . The desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to bring the ship in safety to her destined port. (a)

Here then there was a promise on the part of the

(a) [Whether a promise to pay one an increased compensation for doing a work he was about to abandon, when he had before made a contract to perform it for a definite sum, is valid, or whether it is invalid for want of consideration, is a question upon which the American authorities seem to be in direct conflict. The case of *Monroe v. Perkins*, 9 Pick. (Mass.) 305, and that of *Cooke v. Murphy*, 70 Ill. 98, hold that it may be enforced, while *Ayres v. Chicago, etc., R. R. Co.*, Supt. Ct. Iowa, (8 Cent. L. Jour. 405,) holds that it is without consideration and void; and this view is also taken by *Reynolds v. Nugent*, 25 Ind. 328.]

Hartley v.
Ponsonby, 7
E. & B. 872.

Turner v.
Owen, 3 F.
& F. 177.

Promise not
to do what a
man legally
cannot do.

2 C. B. 548.
[Rood v.
Jones, 1
Douglas
(Mich.) 188.]

Doing that
which a man
is bound
to do.

[Jenness v.
Lane, 28 Me.
475.]

That which
is done must
be different.

sailors to do what their contract already bound them to do. It would have been otherwise if risks had arisen which were not contemplated in the contract. For instance, such a contract as that which the seamen had entered into in the case just cited contains an implied condition that the ship shall be seaworthy. So that where a seaman had signed articles of agreement to help navigate a vessel home from the Falkland Isles, and it turned out that the vessel was not seaworthy, a promise of extra reward to induce him to abide by his contract has been held to be binding.

We have spoken hitherto of cases in which a man has promised to do that which he is already under contract or otherwise legally bound to do. It must be borne in mind that a promise not to do what a man legally cannot do is an equally bad consideration for a promise. The case of *Wade v. Simeon*, cited in discussing forbearance as a consideration, is a sufficient illustration of this point.

It is somewhat more difficult to deal with the same rule when it has to be applied to the doing of *77 that which you are legally bound to do. The simplest illustration of the rule is that which has been most severely commented upon, and is the one which we will use for the purpose of discussion.

The payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt. It is in fact doing no more than a man is already bound to do, and it is no consideration for a promise, express or implied, to forego the residue of the debt. There must be something different to that which the recipient is entitled to in the thing done or given in order to support his promise. The difference must be real, but the fact that it is slight will not destroy its efficiency in making the consideration good, for if the Courts were to say that the thing done in return for a promise was not sufficiently unlike that to which the promisor

was already bound, they would in fact be determining the adequacy of the consideration. Thus, the giving a negotiable instrument for a money debt, or "the gift of a horse, a hawk or a robe, in satisfaction, is good. For it shall be intended that a horse, a hawk or a robe ^{Pinnel's sense,} ^{5 Co. Rep.} might be more beneficial to the plaintiff than money,^{117. [Brooks v. White, 2 Met. 233.]} in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction."

The application of this rule, as described, has been said to involve "an absurd paradox," but it seems in Pollock, p. truth to be a necessary result of the doctrine of consideration. A contract may be discharged by the consent of the parties in one of two ways.

If it is wholly executory, if the liabilities of both parties remain unfulfilled, it can be discharged by mutual consent, the acquittance of each from the other's claims being the consideration for the promise of each to waive his own.

A contract in which A, one of the parties, has done his part, and X, the other, remains liable, cannot (ex-^{Dawber, 6 Ex. 839.} cept in the case of bills of exchange or promissory notes) be discharged by mere consent, but it may be ^[Kidder v. Kidder, 33 Pa. St. 263.] discharged by the substitution of a new agreement.

A has supplied X with goods according to a contract. X owes A the price of the goods. If

<sup>See Part V.
*78 ch. i.</sup>

A waives his claim for the money, where is the consideration for his promise to waive it? If A and X substitute a new agreement, to the effect that X on paying half the price shall be exonerated from paying the remainder, the same question must be repeated: where is the consideration for A's promise to waive the payment of half the sum due to him? The new agreement must have a consideration; there must be some benefit to A or detriment to X in return for A's promise. Detriment to X there can be none in paying half of a sum the whole of which he may at any time be compelled to pay; and benefit to A there can

be none in receiving a portion of a sum the payment of which he can at any time compel. Unless A receives something different in kind, a chattel, or a negotiable instrument, or a fixed for an uncertain sum, his promise is gratuitous and must be made under seal.
 [See Seymour v. Minton, 17 Johns. 169.]

Apparent exceptions. There are some apparent exceptions to this rule which it may be well to discuss, if for no other reason, on the ground that they illustrate the rule itself.

Composition with creditors. A composition with creditors appears at first sight to be an infraction of the rule, inasmuch as each creditor undertakes to accept a less sum than is due to him in satisfaction of the greater. But the promise to pay, or the payment of a portion of the debt, is not the consideration upon which the creditor renounces the residue. That this is so is apparent from the case 5 East. 230. of *Fitch v. Sutton*. There the defendant, a debtor, compounded with his creditors and paid them 7s. in the pound; he promised the plaintiff, who was one of the creditors, that he would pay him the residue when he could; but the plaintiff nevertheless gave him a receipt of all claims which he might have against him "from the beginning of the world to that day." The plaintiff subsequently brought an action for the residue of his claim; the defendant pleaded the acceptance of 7s. in the pound in full of all demands; but

this was held to be no answer to the plaintiff's
 *79 claim. "It is impossible," said Lord ELLENBOROUGH, "to contend that acceptance of £17 10s. is an extinguishment of a debt of £50. There must be some consideration for a relinquishment of the residue; something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*."

Consideration for composition is an agreement The consideration in a composition with creditors must therefore be something other than the mere acceptance of a smaller sum in satisfaction of a larger;

it is the substitution of a new agreement with new between different parties and a new consideration. The Common Law on this point (apart from the Bankruptcy Acts of 1861 and 1869) was settled in the case of *Good v. Cheeseman*,² 2 B. & Ad. 328. There the defendant, a debtor who had compounded with his creditors, set up as against an individual creditor suing for the whole of his debt, not a separate promise by that creditor to forego the residue, but a composition made with all the creditors. The composition was held to be a good defense to the action, and the consideration which supported each creditor's promise to accept a lesser sum in satisfaction of a greater was thus stated by PARKE, J.: "Here each creditor entered into a new agreement with the defendant (the debtor), the consideration of which, to the creditor, was a forbearance by all the other creditors, who were parties, to insist upon their claims." It is in effect the substitution of a new agreement with different parties for a previous debt, and not the payment of a portion of the debt, which forms the consideration in the case of a composition with creditors. (a)

The composition with creditors is therefore no exception to the general rule, inasmuch as the debtor not only pays the creditor a portion of the sum due, but procures a promise by each of his other creditors, or by a certain number of them, that each will be content with a similar proportionate payment if the others will forbear to ask for more. And creditor X not merely gets payment of 10*s.* in the pound from his debtor A, but gets a promise from creditors Y and Z that they too will be content with a payment of 10*s.* in the pound.

A more difficult class of cases to reconcile with the general rule are those in which it has been held that a performance existing contract.

(a) [The facts in the two cases being nearly the same the question was one of pleading.]

contract is binding which is made in consideration of a performance or promise of performance by one of the parties, of a contract already subsisting between himself and a third party. The circumstances under which such a case may arise may be stated thus: "A man may be bound by his contract to do a particular thing; but while it is doubtful whether or no he will do it, if a third person steps in and says, 'I will pay you if you will do it,' the performance is a valid consideration for the payment."

Per Wilde,
B., in Scot-
son v. Pegg,
6 H. & N.
2.5.

The matter is not very easy to understand upon principle; it has been said that the promise is based Pollock, 103. on the creation "of a new and distinct right" for the promisor, in the performance of the contract between his promisee and the third party. But this is in fact to assume that a right is created, which would not be the case if the consideration for the promise were bad.

9 C. B. N. S. In *Shadwell v. Shadwell* the question arose thus: 139. The plaintiff had been under promise of marriage to X; his uncle promised in writing that if he would perform his engagement he should receive during his (the uncle's) lifetime £150 a year. The plaintiff married X; the annuity fell into arrear; the uncle died, and the plaintiff sued his executors. The Court differed as to the existence of the consideration for the uncle's promise. ERLE, C. J., and KEATING, J., thought that the marriage would support the promise, which was in fact an offer capable of becoming a binding contract when the marriage took place. BYLES, J., held that the plaintiff had only done what he was legally bound to do, in performing his promise to marry; that this was no consideration for the uncle's promise, and he dissented from the majority of the

Court. (a)

*81 Whether the promise is conditional on the

(a) [The doctrine of the dissenting opinion is adopted in *John-
son v. Sellers*, 83 Ala. 265.]

performance of the contract, or whether it is given in return for a promise to perform, does not seem to make any difference in principle. If we say that the consideration for it is the detriment to the promisee in exposing himself to two suits instead of one for the breach of his contract, we beg the question, for we assume that an action would lie on such a promise. If we say that the consideration is the promisor's desire to see the contract carried out, we run the risk of confounding motive and consideration. The judgment of WILDE, B., in *Scotson v. Pegg*, seen to leave 6 H. & N. no doubt that in the opinion of the learned Baron a^{295.} promise is binding which is made on such a consideration; the difficulty is to reconcile these decisions with the general principle laid down above and constantly affirmed by the Courts.

The case may however be put in this way: that an ^{Possible ex-} executory contract may always be discharged by agreement between the parties; that A and M, parties to Shadwell v. Shadwell. such an agreement, may thus put an end to it at any time by mutual consent; that if X says to A, "do not exercise this power; insist on the performance by M of his agreement with you, and I will give you so and so," the carrying out by A of his agreement, or his promise to do so, would be a consideration for a promise by X. A in fact agrees to abandon a right which he might have exercised in concurrence with M, and this, as we have seen, has always been held to be See ante, p. 67. consideration for a promise.

3. *Consideration must be legal.*

It is well to state this rule as indicating a necessary element in consideration, but inasmuch as the consideration for a promise is the object for which one of the parties makes the contract, the legality of consideration must form a part of a subsequent discussion, and will be treated when we come to consider, as an

*82 element in the Formation of Contract, the legality of the objects for which the parties to a contract enter into it.

4. *Consideration may be executory or executed, it must not be past.*

Considera-
tion.

We now come to deal with the relation of the consideration to the promise in respect of time. The consideration for a promise may be *executory*, and then it is a promise given for a promise; or it may be *executed*, and then it is an act or forbearance given for a promise, the act or forbearance constituting at once the proposal or acceptance and the consideration for the promise given in respect of it; or it may be *past*, and then it is a mere sentiment of gratitude or honor prompting a return for benefits received; in other words, it is no consideration at all.

Executory
considera-
tion: see
ante, p. 65.

As to *executory* considerations nothing remains to be added to what has been said with regard to the nature of considerations in general. It has been shown that a promise on one side is good consideration for a promise on the other.

Executed
considera-
tion.

A contract arises upon executed consideration when one of the two parties has either in the act which amounts to a proposal or the act which amounts to an acceptance done all that he is bound to do under the contract, leaving an outstanding liability on one side only. The two forms of consideration thus suggested are described by Mr. Leake as "acceptance of an executed consideration," and "consideration executed upon request." They arise when, as described above, the proposal is an offer of an act for a promise, or an offer of a promise for an act.

Leake on
Contracts,
p. 23.

See, on Pro-
posal and
Acceptance,
ante, p. 13.

Offer of an
act for a
promise.

In the first case a man offers his labor or goods under such circumstances that he obviously expects to be paid for them, the contract arises when the labor or goods are accepted by the person to whom they are

offered, and he by his acceptance becomes bound to pay a reasonable price for them. "If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value." So in *Hart v. Mills* the defendant had ordered four dozen of wine and the plaintiff sent eight, the defendant retained thirteen bottles and sent back the rest, and the plaintiff sued him on the original contract for the purchase of four dozen. It was held that the retention of thirteen bottles was not an acquiescence in the misperformance of the original contract, but a new contract arising upon the acceptance of goods tendered, and that the plaintiff could only recover for thirteen bottles. "The defendant orders two dozen of each wine and you send four: then he had a right to send back all; he sends back part." What is it but a new contract as to the part he keeps?"

It must however be borne in mind that where the person to whom such an offer is made has no opportunity of accepting or rejecting the things offered, an acceptance which he cannot help will not bind him. For instance, A agreed with X to command his ship during a voyage; in the course of the voyage he threw up his command but helped to work the vessel home. Afterwards he sued X, among other things, for service thus rendered in bringing back the ship. But the Court would not admit a claim for such services: evidence of "a recognition or acceptance of services may be sufficient to show an implied contract to pay for them if at the time the defendant had power to accept or refuse the services. But in this case it was not so. The defendant did not know of the services until the return of the vessel, and it was then something past, which would not imply—perhaps would not support—a promise to pay for it." And the difficulty which would arise, should such an enforced acceptance create

a promise, is forcibly stated by POLLOCK, C. B.: "Suppose I clean your property without your knowledge, have I then a claim on you for payment? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?"

Offer of a
promise for
an act.

*84 The "consideration executed upon request," or the contract which arises on the acceptance by act of the offer of a promise, is best illustrated by the case of an advertisement of a reward for services which makes a binding promise to give the reward when the service is rendered. Under these circumstances it is not the proposer, but the acceptor who has done his part as soon as he becomes a party to the contract. Thus if A makes

England v. Davidson, 11 A & E. 356. [Loring v. Boston, 7 McL. 411.]

a general offer of reward for information and X supplies the information, A's offer is turned into a binding promise by the act of X, and X at once concludes the contract and does all that he is bound to do under it.

And this form of consideration will support an implied as well as an express promise where a man is asked to do some service which will entail certain liabilities and expenses. In such a case the request for such services implies a promise, which becomes binding when the liabilities or expenses are incurred, to make good his loss to the promisee. Thus where the defendant employed an auctioneer to sell her estate, and the auctioneer was compelled in the course of the proceedings to pay certain duties to the Crown, it was held that the fact of employment implied a promise by the defendant to repay the amount of the duties, and entitled the auctioneer to recover them. "Whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, as where he is placed by him under a liability to pay, and *does pay*, makes no difference."

*Brittain v.
Lloyd, 14 M.
& W. 762.*

It is probably on this principle, the implication of a promise in a request, and not on the theory that a

subsequent and distinct promise to make a return for things done on a mere request relates back to the request, that the case of *Lamplleigh v. Braithwait* is 1 Sm. L. C. is capable of explanation. But this fails to be dealt ^{141.} with shortly.

Having explained the nature of an executed consideration, it remains to distinguish present from past consideration.

distinguished
from past
considera-
tion.

A past consideration is, in effect, no consideration at all; that is to say, it confers no benefit on the promisor, and involves no detriment to the promisee in respect of his promise. A past consideration is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If afterwards, whether from good feeling or interested motives, it matters not, he makes a promise to the person by whose act or forbearance he has benefited, and that promise is made upon no other consideration than the past benefit, it is gratuitous and cannot be enforced; it is based upon motives, and not upon consideration.

The rule that a past consideration will not support a subsequent promise is only another mode of saying that every promise, whether express or implied, must, in order to be binding, be made in contemplation of a present or future benefit to the promisor.

A purchased a horse from X, and afterwards, in consideration of the previous sale, promised that the horse was sound and free from vice. It was in fact a vicious horse. It was held that the sale created no implied warranty or promise that the horse was not vicious; that the promise must therefore be regarded as independent of the sale, and as an express promise based upon a previous transaction. It fell therefore "within the general rule that a consideration past and executed

Roscoris v. Thomas, 3 Q. B. 234.
[*Bulkeley v. Landon*, 2 Conn. 404.]

will support no other promise than such as would be implied by law."

To the general rule thus laid down certain exceptions are said to exist; and it is proposed to endeavor to ascertain the nature and limits of these exceptions, which are perhaps fewer and less important than is sometimes supposed.

Consideration moved by previous request.

(a) A past consideration will, it is said, support a subsequent promise, if the consideration was given at the request of the promisor.

1 Sm. L. C. 67.

*86 In *Lamplleigh v. Braithwait*, which is regarded as the leading case upon this subject, the plaintiff sued the defendant for £120 which the defendant had promised to pay to him in consideration of services rendered at his request. The court here agreed "that a mere voluntary courtesy will not have consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit."

Hobart, 103.
See cases collected in the note to Hunt v. Bate. Dyer, 272 a. [Booth v. Fitzpatrick, 30 Vt. 681.]

The case of *Lamplleigh v. Braithwait* was decided in the year 1615, and for some time before and after that decision, cases are to be found which go to show, more or less definitely, that a past consideration if moved by a previous request will support a promise. But from the middle of the seventeenth century until the present time no direct authority for the rule can be discovered, with the exception of the case of *Bradford v. Roulston*, decided in the Irish Court of Exchequer in 1858. The rule is frequently mentioned as existing, but in the few modern cases which have incidentally dealt with it, it appears to be regarded as open to question or to be susceptible of a different interpretation to that which is placed upon it in text-books.

Thus in *Kaye v. Dutton*, TINDAL, C. J., first lays down the rule that where a consideration executed implies a promise of a particular sort, a subsequent promise based on the same consideration is not binding. By this he means that where, from the acceptance of consideration executed, the law implies a promise by the acceptor to make a return, the consideration is exhausted upon that promise. There is nothing further to support a subsequent and independent promise.

He then goes on to say, "The case *may perhaps* be different where there is a consideration from which no promise would be implied by law: that is, where the party suing has sustained a detriment to himself or conferred a benefit on the defendant at his request under circumstances which would not raise any implied promise. In such cases it appears to have been held *in some instances* that the act done at the request of the party charged is a sufficient consideration to render binding a promise afterwards made by him in respect to the act so done.... But it is not necessary to pronounce any opinion on that point."

The interpretation of the rule which TINDAL, C. J., regarded as open to question is further narrowed by MAULE, J., in *Elderton v. Emmens*. "An executed consideration will sustain only such a promise as the law will imply." And again in *Kennedy v. Broun*, ERLE, C. J., puts the case of *Lamplleigh v. Braithwait*, 13 C. B. N. S. 677. from a modern point of view. "It was assumed," he says, "that the journeys which the plaintiff performed at the request of the defendant and the other services he rendered would have been sufficient to make any promise binding if it had been connected therewith in one contract: the peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably at the present day, such service on such a request would have raised a promise by implication to pay what it was

worth; and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount."

¹ Bing. N. C. 490. This would seem to be the *ratio decidendi* in *Wilkinson v. Oliveira*, where the plaintiff, at the defendant's request, gave him a letter for the purposes of a lawsuit. The letter proved the defendant's case, by which means he obtained a large sum of money, and he subsequently promised the plaintiff £1,000. Here the plaintiff evidently expected something in return for giving up the letter, and the defendant's request for it amounted in effect to an offer that if the plaintiff would give him the letter he would pay a sum to be hereafter fixed.

Regarded from this point of view the rule which we are discussing amounts to this: where a request is

made which is in substance an offer of a promise

*88 upon terms to be afterwards ascertained, and services are rendered in pursuance of that request, a subsequent promise to pay a fixed sum is either to be regarded as a part of the same transaction, or as evidence to assist the jury in determining what would be a reasonable sum.

⁸ Ir. C. L. 468, ^{Langdell} ^{450.} In opposition to this view stands the case of *Bradford v. Roulston*, the only case in modern times in ^{Constr.} Sec. ed. 432. which the rule in *Lamplleigh v. Braithwait* has come before the courts for express decision. In that case Bradford, who had a ship to sell, was introduced by Roulston to two persons who were willing to purchase it. At the time of executing the bill of sale of the ship the purchasers were £55 short of the money agreed to be paid. Bradford nevertheless executed the bill of sale at the request of Roulston, and in consideration of this, Roulston upon a subsequent day guaranteed the payment of the balance of £55 still due. There seems to have been some evidence that the guarantee was given at the time of the sale and was

subsequently put into writing, but the court felt it necessary to give an express decision, on the supposition that the consideration was wholly past, to the effect that the execution of the bill of sale to third parties upon the request of the defendant was consideration for a subsequent promise by him to answer for their default. The authorities were elaborately reviewed and the rule in *Lamplleigh v. Braithwait* was adhered to in its literal sense.

It is submitted, however, that this decision must be received with some hesitation. The *dictum* of ERLE, C. J., in *Kennedy v. Broun* was not adverted to; the case of *Wilkinson v. Oliveira* was regarded as a direct authority for the rule in its most extended sense, a view which, upon the facts of that case, is certainly open to question; and the great gap in the chain of express decisions on the point does not appear to have impressed the court.

The practical difficulties to which such an interpretation of the rule would give rise are obvious.

Is any limit to be assigned to the time which may elapse between the act done upon request and the promise made in consideration of it? This difficulty pressed upon the court in one of the oldest cases upon this subject, *Halifax v. Barker*, where a promise was held not to be binding which was given upon consideration of a payment made upon request a year before. This suggests that the true solution is to be found in the supposition that the subsequent promise is only binding when the request, the consideration, and the promise form substantially one transaction.

Another difficulty would arise as to the definition of "a request." Let us suppose that a man dangerously ill is informed by his physician that his state is so critical as to justify desperate remedies; the physician advises him to try a remedy which he believes may

possibly restore him to health, but if it does not do so, will probably kill him in a few hours; the remedy is of the physician's own invention, and he asks the patient in view of his desperate condition to allow him to make the experiment. The patient takes it and is cured; the fame of the cure makes the fortune of the physician, and a year or two afterwards, finding himself in good circumstances, he promises to his former patient a sum of money in consideration of the acceptance of his remedy at his request. It is hardly possible to suppose that an action would lie upon such a promise. Yet it is a logical deduction from the decision of the Court in *Bradford v. Roulston*, and from the statement therein contained "that where there is a past consideration, consisting of a previous act done at the request of the defendant, it will support a subsequent promise." (a)

And so we are driven to the conclusion that, unless the *request* is virtually an offer of a promise the precise extent of which is hereafter to be ascertained, or is so clearly made in contemplation of a promise to be given by the maker of the request that a subsequent promise may be regarded as a part of the same *90 transaction, the rule in *Lamplleigh v. Braithwait* has no application. And it may not be presumptions to say that in spite of the cases decided between

(a) [It could scarcely be called a request where a party, as in the case supposed by the author, gives advice to another for his benefit alone, and if the person acts upon that advice and is benefited, the fact that the advisor is also incidentally benefited would be no reason for treating the advice as a request, and making it a consideration for a future promise which might be based upon such incidental benefit. The question whether there was a prior legal request would be decided by considering whether the parties expected or supposed that the one who was asked to do the act was, under any circumstance to be rewarded, and if neither party had such an idea, no liability could arise from the compliance with the request.]

1568 and 1635, of the continuous stream of dicta in text-books, and of the decision in *Bradford v. Roulston*, the rule cannot be received in such a sense as to form a real exception to the principle that a promise, to be binding, must be made in contemplation of a present or future benefit to the promisor.

(b) A more substantial exception to the general rule is to be found in the cases in which a person has been held capable of reviving an agreement by which he has benefited, but which by rules of law since repealed, incapacity to contract no longer existing, or mere lapse of time, is not enforceable against him. The principle upon which these cases rest is, "that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it." *Per Parke, B., Earle v. Oliver;*² *Exch. 71.*

The following illustrations of the principle are to be found in the Reports.

A promise by a person of full age to satisfy debts contracted during infancy was binding upon him before 37 and 38 Vict. c. 62. *Williams v. Moor.* ^{11 M. & W. 268. [See Bliss v. Per-}

A promise made by a bankrupt discharged from debts by a certificate of bankruptcy to satisfy the whole or part of debts due to a creditor was binding before 12 and 13 Vict. c. 102, § 204. *Truman v. Fenton.* ^{ryman, 1 Scam. 484.] Cowp. 544. [Maxim v. Morse, 8 Mass. 127.]}

A debt barred by the Statute of Limitations is consideration for a subsequent promise to pay it.

In *Lee v. Muggeridge* a married woman gave a bond for money advanced at her request to her son by a former husband. Afterwards when a widow, she promised that her executors should pay the prin- ^{[Lonsdale v. Brown, 4 Wash. C. C. 86.] 5 Taunt. *91 36.}

cipal and interest secured by the bond, and it was held that this promise was binding.

1 H. & C. 703. In *Flight v. Reed* bills of exchange were given by the defendant to the plaintiff to secure the repayment of money lent at usurious interest while the usury laws were in force. The bills were therefore void as between the plaintiff and defendant. After the repeal of the usury laws by 17 and 18 Vict. c. 90, the defendant renewed the bills, the consideration for renewal being the past loan, and it was held that he was liable upon them.

Common elements in all the cases.

There are certain features common to all these cases. Each in its origin presents the essential elements of agreement, and in each one of them one of the parties has got all that he bargained for. The other party cannot obtain what he was promised, either because he made an agreement with one who was incapable of contracting, or because a technical rule of law forbids the agreement to be enforced. If the party who has received the benefit which he expected from the agreement afterwards acquires capacity to contract, or if the rule of law is repealed, as in the case of the Usury Acts, or, as in the case of the Statute of Limitations, admits of a waiver by the person whom it protects, then a new promise based upon the consideration already received is binding.

They do not rest upon moral obligation.

The rule thus regarded seems a plain and reasonable exception to the general doctrine that a past consideration will not support a promise. Unfortunately, while the rule was in the course of establishment it rested for a time upon the support of the *moral obligation* which was supposed to bind the person benefited and to give efficacy to his promise. It would have seemed enough to have said that when two persons have made an agreement, and one has got all the benefit which he expected from it, and is protected by technical rules of law from doing what he had promised to do in return,

he will be bound if, when those rules have ceased to operate, he renews his original promise. But when once the law of contract was brought into *92 the cloudland of moral obligation, it became extremely hard to say what promises might or might not be enforced. The phrase was far larger than the circumstances needed, and the language used in some of the cases cited above was calculated to make the validity of contracts turn upon a series of ethical problems.

In *Lee v. Muggeridge*, MANSFIELD, C. J., says: "It has long been established, that where a person is morally and conscientiously bound to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question therefore is whether upon this declaration there appears a good moral obligation."

This case affords perhaps the strongest example of the mode in which the phrase was employed. Its effect, after it had undergone some criticism from Lord TEN-
TERDEN, was finally limited by the decision in *Eastwood v. Kenyon*. The doctrine of the sufficiency of moral obligation to support a promise was there defi-
nitely called in question. The plaintiff, as guardian and agent of the defendant's wife, had, while she was a minor, laid out money upon the improvement of her property: he did this voluntarily; and in order to do so was compelled to borrow money, for which he gave a promissory note. When the minor came of age she assented to the transaction, and after her marriage her husband promised to pay the note. Upon this promise he was sued. The moral duty to fulfill such a promise was insisted on by the plaintiff's counsel, but was held by the Court to be insufficient where the consideration was wholly past. "Indeed," said Lord DENMAN in delivering judgment, "the doctrine would annihilate the necessity for any consideration at

all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it."

Voluntarily doing what another was legally bound to do. (c) There is but one other so-called exception to the general rule. We find it laid down that "where the plaintiff *voluntarily* does that whereunto the defendant was legally compellable, and the defendant afterwards, in consideration thereof, expressly promises," he will be bound by such a promise.

Smith, L. C.
148.

It is submitted that the authority of this rule fails altogether so far as it rest on the cases which are habitually cited in support of it. Curiously enough, all turn upon the liability of parish authorities for medical attendance upon paupers who are settled in one parish but resident in another.

Buller, Nisi Prius, 147.

But see Selwyn's Nisi Prius, p. 51, n. 11.

2 East, 504.

In *Atkins v. Banwell* (1802) it was held that the moral obligation resting upon the parish in which a pauper is settled, to reimburse another parish, in which the pauper happened to be taken ill, for expenses incurred in medical attendance, is not sufficient to create a legal liability without an express promise.

1 B. & A. 105. In *Wing v. Mill* (1817), the pauper was also residing out of his parish of settlement; but that parish acknowledged its liability for his maintenance by making him a weekly allowance. The pauper fell ill and died: during his illness he was attended by the plaintiff, an apothecary, who, after the pauper's death, was promised payment of his bill by the defendant, overseer of the parish of settlement. The Court held the defendant liable.

It is not easy to collect from the judgments of Lord

ELLENBOROUGH, C. J., and BAYLEY, J., what were the grounds of their decision. Some sentences suggest that they held on the authority of *Watson v. Turner*, that a moral obligation will support a promise; others suggest that they held that there was a legal obligation cast on the parish of residence to do that which the parish of settlement might legally have been compelled to do, and that a quasi-contractual relation *94 See ante, p. 6. thus arose between the parties; others again suggest that the allowance made to the pauper by the parish of settlement showed a knowledge that the pauper was being maintained at their risk, and amounted to an implied authority for bestowing the necessary medical attendance. This last is the view entertained as to the *ratio decidendi* in *Wing v. Mill* by the Court of Exchequer in the only case remaining for examination.

In *Paynter v. Williams* (1833) the facts were similar to those in *Wing v. Mill*, with this very important exception, that there was no subsequent promise to pay the apothecary's bill. The defendant parish, the parish of settlement, was nevertheless held liable to pay for medical attendance supplied by the parish of residence. The payment of an allowance by the parish of settlement was held by Lord LYNDHURST, C. B., to amount "to a request on the part of the officers that the pauper shall not be removed, and to a promise that they will allow what was requisite."

It would seem then, that in the cases which are said to furnish this supposed rule the promise was either based upon a moral obligation, which, since the decision in *Eastwood v. Kenyon*, would no longer be sufficient to support it, or was merely an acknowledgment of an existing liability arising from a contract which might be implied by the acts of the parties,—a liability which, on the authority of *Paynter v. Will-*

iams, existed apart from the fact of a subsequent promise.

And this is stated to be the true ground upon which the decision in *Watson v. Turner* may be supported, p. 51, n. 11. in the note to *Selwyn's Nisi Prius* above referred to.

"The defendants, being bound by law to provide for the poor of the parish, derived a benefit from the act of the plaintiff, who afforded that assistance to the pauper which it was the duty of the defendants to have provided: this was the consideration, and the

subsequent promise by the defendants to pay for *95 such assistance *was evidence from which it might be inferred that the consideration was performed by the plaintiff with the consent of the defendants*, and consequently sufficient to support a general *indebitatus assumpsit* for work and labor performed by the plaintiff for the defendants, *at their request.*"

It may not be safe to say that the rule as habitually laid down is non-existent, but the cases cited in support of it seem to fail, on examination, to bear it out. It seems strange that it should have been so often reiterated upon such scanty and unsatisfactory authority.

a. 25, sub. 2. It has however been adopted in the Indian Contract a. 2, sub. (d.) Act, which also, in its definition of consideration, includes the "consideration executed upon request" of *Lampleigh v. Braithwait*. It is perhaps unfortunate that the framers of that Act should have so readily abandoned so satisfactory a test of the validity of simple contracts as the English doctrine of Consideration has proved itself to be.

CHAPTER III.

*96

CAPACITY OF PARTIES.

WE have hitherto dealt with the Contract itself and those elements in its structure which are essential to give it even a *prima facie* validity. Definite Proposal and Acceptance, and Form, or Consideration are necessary to an agreement, the effect of which is to be entertained by courts of law; but when we have constructed an apparently binding contract, it is necessary before we can pronounce finally upon its validity, that we should look to the parties to it, and ask who made it, under what circumstances, and with what object. In other words, we have to enquire whether the parties were capable of contracting, whether their apparent consent was genuine, and whether their objects were such as the law will admit.

And, first, as to the capacity of parties.

There are certain persons whom the law regards as incapable, wholly or in part, of binding themselves by promise, or of enforcing a promise made to them. And this incapacity may arise from the following causes:

- (1) Political or professional status.
- (2) Youth which, until the age of 21 years, is supposed to imply an immaturity of judgment which the law will protect. (a)
- (3) The merger or absorption, at any rate for contractual purposes, of the status of one person in that

(a) [In some of the American States females become of age at eighteen.]

of another, which arises in the case of a married woman upon and during her marriage.

*97 (4) Artificiality of construction, such as that of corporations, which being given a personality by law, take upon it such terms as the law imposes.

(5) The permanent or temporary mental aberration of lunacy or drunkenness.

§ 1. *Political or Professional Status.*

An alien.

An alien has all power of contracting which a natural born British subject has, except that he cannot acquire property in a British ship.

An alien enemy.

O'Mealy v. Wilson, 1 Camp. 483. [Griswold v. Waddington, 15 Johns. 57. The Rapid, 8 Cranch. 155.]

An alien enemy, or British subject adhering to the King's enemies,¹ cannot, without license from the Crown, make any fresh contract or enforce any existing contract during the continuance of hostilities; but his rights as to outstanding contracts made before the commencement of war are suspended, not annulled, and can be enforced upon the conclusion of peace.

Foreign sovereigns and their representatives.

Taylor v. Best, 14 C.B. p. 487.

Foreign States and sovereigns and their representatives, and the officials and household of their representatives, are not subject to the jurisdiction of the courts of this country unless they submit themselves to it. A contract entered into with such persons cannot therefore be enforced against them unless they so choose, although they are capable of enforcing it.

Felon undergoing sentence.

33 & 34 Vict. c. 23, ss. 8, 9. 10.

A person convicted of treason or felony cannot, during the continuance of his conviction, make a valid contract; nor can he enforce contracts made previous to conviction; but these may be enforced by

¹ It does not seem to be clearly settled that anything short of residence in a hostile country for trading purposes constitutes adherence to the king's enemies. The case of *Roberts v. Hardy*, 8 M. & S. 533, exhibits the reluctance of the courts to draw conclusions from the mere fact that a man was resident in a hostile country when it was possible for him to have removed.

an administrator appointed for the purpose by the Crown. (a)

A Barrister cannot sue for fees due to him for services rendered in the ordinary course of his professional duties, whether the action be framed as arising upon an implied contract to pay for services rendered on request, or upon an express contract to pay a certain sum for the conduct of a particular business. (b)

A physician, until the year 1858 was so far in the position of a barrister that the rendering of service on request raised no implied promise to pay for them, though the patient might bind himself by express contract; but now, by 21 & 22 Vict. c. 90, every physician may sue on such an implied contract, subject to the right of the College of Physicians to regulate this right by law. (c) 21 & 22 Vict. c. 90, s. 31.

§ 2, *Infants*

The rules of law relating to the rights and liabilities of infants upon contracts entered into by them during infancy have been considerably modified by recent legislation. It will be therefore well to state the rules of

(a) [In some of the States there are constitutional provisions that no conviction shall work corruption of blood or forfeiture of estate.]

(b) [In most States the office of attorney and that of counsellor or barrister is united in the same person, and recompense can be recovered for services rendered in either capacity. *Newman v. Washington*, Martin, Yerg. (Tenn.) 79; *Wilson v. Burr*, 25 Wend. (N. Y.) 386; *Vilas v. Downer*, 21 Vt. 419, and *Gray v. Bruckinridge*, 2 Pen. & Watts, (Pa.) 75. But in New Jersey counsel fees as such are not recoverable, *Vanatta v. McKinley*, 1 Harrison L. 235, and *Blake v. City of Elizabeth*, 2 N. J. Law Journal, 328.]

(c) [There is no such rule in the United States, but some States require a license from some authority, as a condition of practicing as a physician, *Hewitt v. Wilcox*, 1 Met. (Mass.) 154; *Judah v. McNama*, 3 Blackf. (Ind.) 269, and *Mooney v. Lloyd*, 5 Serg. & R. (Pa.) 416.]

Common Law upon the subject, and then to consider the modification in historical order.

**General rule
of Common
Law. Inf-
ant's con-
tract void-
able.**

The general rule of Common Law is, that an infant's contract is voidable at his option, either before or after he has attained his majority. And this rule is thus affected:

- (1) The contract ceases to be voidable if it be ratified upon the attainment of 21 years of age.
- (2) The contract cannot be avoided if it be for necessaries.

We will deal with these two exceptions in order.

(1) *Ratification.*

**(1) Ratifica-
tion.
Pollock on
Contracts,
pp. 36, 41.**

Mr. Pollock, in an exhaustive and convincing argument, has shown clearly that the better opinion has ever been that the contract of an infant is not void but voidable at his option. Being so voidable, the in-

*99 **fant may (apart from statutory restrictions) ratify his contract when he attains his majority, and assume the rights and liabilities arising from it. "The general doctrine is," said the court in *Williams v. Moor*, "that a party may, after he attains the age of 21 years, ratify and so make himself liable on contracts entered into during infancy."** It may be well to remind the reader that such a ratification is, or was, an illustration of the limited class of cases in which a past consideration has been allowed to support a subsequent promise.

**11 M. & W.
263 [Conk-
lin v. Oz-
born, 7 Ind.
553.]**

**Ratification
of two kinds.
37 & 38 Vict.
c. 62.**

**Contracts
valid until
rescinded.
[Blanken-
ship v. Stout,
25 Ill. 132.]**

But it would seem that ratification is of two kinds. And it may perhaps be said that, before the Infant's Relief Act, the ratification required to make the infant liable upon contracts entered into by him during infancy differed, in correspondence with a certain difference in kind in the contracts to which he became a party. Some of these are valid unless rescinded, others invalid until ratified. It would seem that where an infant acquires an interest in permanent property to which obligations attach, or enters into a contract which involves continuous rights and duties, benefits

and liabilities, and has taken benefits under the contract, he would be bound unless he expressly disclaimed the contract. On the other hand, a promise to perform some isolated act, or a contract wholly executory, would not be binding upon the infant unless he expressly ratified it upon coming of age.

Illustrations of contracts which required a special disclaimer to avoid them — which were valid unless Interests in rescinded — may be found in the following cases: realty.

An infant lessee who occupies until majority is liable Rolle, Abr. for arrears of rent which accrued during his minority. 731. Shareholders who become possessed of their shares during infancy are liable for calls which accrued while they were infants. "They have been treated therefore in corporate as persons in a different situation from mere contract- property. owners, for then they would have been exempt; but in truth they are purchasers who have acquired an interest, *not in a mere chattel, but in a subject *100 of a permanent nature*, either by contract with the company, or purchase or devolution from those who have contracted, and with certain obligations attached to it which they were bound to discharge, and have thereby been placed in a situation analogous to an infant purchaser of real estate who has taken possession, and thereby becomes liable to all the obligations attached to the estate; for instance, to pay rent in the case of a lease rendering rent, and to pay a fine due on the admission in the case of a copyhold to which 3 Burr. 1717. an infant has been admitted, unless they have elected to waive or disagree to the purchase altogether, either N. W. R. Co. during infancy or at full age, at either of which times 5 Ex. 114. it is competent for an infant to do so.(a)

Similarly an infant may become a partner, and at in partnership. Common Law may be entitled to benefits, though not

(a) [For a full discussion of this subject, see Story on Contracts, 5th ed., note 4 to Sec. 118.]

Lindley, I.
81.

liable for debts arising from the partnership during his infancy. Equity, however, would not allow an infant, in taking the partnership accounts, to claim to be credited with profits and not debited with losses. But what is important for our present purpose to note is, unless there be an express rescission and disclaimer of the partnership which was entered into after infancy, the partner will be liable for losses accruing after he came of age.

Where an infant held himself out as in partnership with X, and continued to act as a partner till shortly before he came of age, and then, though ceasing to act as a partner, did nothing to disaffirm the partnership, ^{Goodev. Har. he was held liable on debts which accrued after he rison, 5 B. & Ald. 150.} came of age, to persons who supplied X with goods.

[Miller v. Sims, 2 Hill. (S. Car.) 479.] “Here,” said Best, J., “the infant, by holding himself out as a partner, contracted a *continual obligation*, and that obligation remains till he thinks proper to put an end to it.... If he wished to be understood as no longer continuing a partner, he *ought to have notified it to the world.*”

Contracts invalid until ratified.

Although the liabilities incurred by the infant *101 are somewhat different in these different cases, yet there is this feature common to all of them, that nothing short of express disclaimer will entitle a man, on attaining his majority, to be free of obligations such as we have described. It is otherwise in contracts which are not thus continuous in the operation. The infant is not bound unless he expressly ratify them.

(2.) Necessaries—what are they.

*104 (2) We must now consider the liability of an infant for necessities.

And we must first ascertain what are “necessaries.”

It has always been held that an infant may bind himself by contract for the supply to him not merely of the necessities of life, but of such things as are suitable to his station in life and to his particular cir-

cumstances at the time. The best discussion of the subject of necessaries is to be found in the judgment of BRAMWELL, B., in *Ryder v. Wombwell* — a judgment the conclusions of which were adopted by the Exchequer Chamber. The difficulty which has arisen in respect of them consists mainly in determining the provinces of the court and the jury in ascertaining them, and the rules applicable to the matter may perhaps be stated thus:

(a) Evidence being given of the things supplied and the circumstances of the infant, the court determines whether the things supplied can reasonably be considered necessaries at all; and if it comes to the conclusion that they were not, the case may not be submitted to the jury at all.

Things may obviously be incapable of being necessities. A wild animal, or a steam roller, could hardly, under any circumstances, be considered to be such.

Things may be of a useful character, but the quality or quantity supplied may take them out of the character of necessities. Elementary text-books might be necessary to a student of law, but not a rare edition of "Littleton's Tenures," or eight or ten copies of "Stephen's Commentaries." Things necessary to a person in one station in life would not be necessary to a person in a different station; or, again, things not usually necessary may become so from the circumstances of the infant.

Medical attendance and expensive articles of food may ordinarily be dispensed with, but may become necessary in case of ill-health.

It does not follow therefore that, because a thing is of a useful class, a judge is bound to allow a jury to say whether or no it is a necessary under all the circumstances of the case.

(b) If the judge conclude that the question is an open one, and the things supplied are such as may be of judge and jury:

*Brayshaw v.
Eaton,
7
Scott, at p.
187.*

of Court in
banc and
of Appeal.

Infant may
not be
charged
upon con-
tract framed
as a tort.
*Jennings v.
Rundall,
8 T. R. 335.
[West v.
Moore, 14 Vt.
447.]*

[*Badger v.
Phinney, 15
Mass. 359.*]

but may for
actual tort,
though
originating
in contract.

reasonably be considered to be necessaries, he leaves it to the jury to say whether, under the circumstances of the case, the things supplied were necessaries as a fact. And the jury determines this point, taking into consideration the character of the things supplied, the extent to which the infant was already supplied with them, and the actual circumstances of the infant. We say "actual circumstances," because a false impression which the infant may have conveyed to the tradesman as to his station and circumstances will not affect his liability. If a tradesman supplies expensive goods to an infant because he thinks that the infant's circumstances are better than in fact they are, he does so at his peril.

(c) The ruling of the court and the finding of the jury are both alike subject to review by the Courts of Appeal.

An infant is liable for wrong, but a breach of contract may not be treated as a wrong so as to make the infant liable; the wrong must be more than a misfeasance in the performance of the contract, and must be separate from and independent of it. Thus where an infant hired a mare to ride and injured her by *106 over-riding, it was held that he could not be made liable upon the contract by framing the action in tort for negligence. Nor can an infant be made liable for goods sold and delivered by charging him in trover and conversion, [except where the contract was made and the goods obtained by fraud, in which case the agreement will be voidable, and no title to the goods will pass.]

But when an infant hired a horse expressly for riding and not for jumping, and then lent it to a friend who jumped the horse and killed it, he was held liable; "for what was done by the defendant was not an abuse

of the contract, but was the doing of an act which he Burnard v. was expressly forbidden by the owner to do with the Haggis, 14 C. animal."(a) B. N. S. 45.

§ 3 *Married Women.*

It may be stated as a general rule that the contract Their contracts are void of a married woman is void.

The exceptions to this rule vary in the extent to which they affect the capacity of married women to contract; and they vary in this way: In some cases a married woman can make a valid contract, but she cannot sue or be sued apart from her husband; in others she can sue, but cannot be sued alone; in others she can both sue and be sued alone.

(1) There is a group of exceptions which go to this extent, that a married woman can under certain circumstances acquire contractual rights, which may be taken advantage of by the husband alone, or, if the husband please, by the joint action of husband and wife: these rights, unless the husband has so dealt with them as to have made them his own, survive to the wife, and do not pass to his executors. Such rights appear to arise where a promise is made to the wife in consideration of her personal services, or where a *chose in action* has been assigned to her which the husband does not "reduce into possession," or make his own by some act evidencing his intention to deal with the right as his.

Thus, in an old case, a married woman was promised £10 in consideration of her curing a wound. She effected the cure, and an action was brought for the of action.'

(a) [The American authorities seem generally to uphold the position taken in the text. *Campbell v. Stakes*, 2 Wend. (N. Y.) 137; *Green v. Sperry*, 16 Vt. 390; *Town v. Wiley*, 23 Vt. 354; *Honer v. Thwing*, 3 Pick. (Mass.) 492; *Vasse v. Smith*, 6 Cranch, (U. S. S. C.) 226. But, see *Wilt v. Welsh*, 6 Watts. (Pa.) 9, and *Penrose v. Curran*, 3 Rawle, (Pa.) 351.]

Brashford v. Buckingham and wife, Cro. Jac. 77. [See *Fish v. Cushman*, 6 Cush. 20.] money by her husband and herself. It was objected that she should not have been joined, as having no rights independent of her husband during coverture; but the Court of Exchequer Chamber held "that she was the cause of the action, and so the action brought in both their names was well enough; and such an action shall survive to the *Feme*."

Where a chose in action is assigned to her.

So again, where a married woman has received a promissory note, it can be sued upon jointly by herself and her husband, and will survive to her unless reduced into possession by the husband in his lifetime. The woman is not a party to the original contract, but the rights arising under it are assigned to her, and she is thus capable of acquiring them, and, subject to the exercise of her husband's rights in the matter, of enjoying them.

Dalton v. Mid. Coun. R. Co., 13 C. B. 478.

Similarly, a married woman can become a registered holder of shares, and has a right of action jointly with her husband, if he choose to join her, and a right to the *chose in action* after her husband's decease if he have not previously reduced it into possession. "It is settled law, that a married woman, though incapable of making a contract, is capable of having a *chose in action* conferred upon her, which will survive to her on the death of her husband unless he shall have interfered by doing some act to reduce it into possession."

It would seem from this case that, when a married woman has acquired a negotiable instrument or assignable *chose in action*, the courts do not look further into the matter and ask whether she obtained it in virtue of a contract which she was incapable of making. They regard it as her property, subject always to the right of her husband to make it his if he choose to do so.

*108 (2) A married woman can stand to her husband in the relation of agent to principal, so as to bind him by contracts which she may make under certain circumstances.

Where husband and wife are living together the implied authority as a wife has an implied authority to bind her husband by contract for necessaries for herself and her household. The rules for the interpretation of necessities are similar in principle to those which govern the meaning of the term in the case of an infant. Beyond this the wife has no presumed authority as a wife, though she may receive an express or implied authority for the purpose of trade or otherwise to act as agent for her husband. But this is a part of the general law of agency, and has no special relation to the status of married women.

Where husband and wife are living apart there is no such presumption of authority in favor of the wife as was described above, and a tradesman who supplies her with goods under such circumstances does so at his own risk. For if she be supplied by her husband with an adequate allowance (the adequacy of which is a question for the jury;) or if she have made terms with her husband upon separation, or if she be living apart by her own fault, her husband is not liable upon any contract she may make, even for necessities.

[See Bowers v. Sturdevant, 4 Eastland v. Burchell, L. R. 3 Q. B. D. 432. Den. 467; Rea v. Durkey, 25 Ill. 503; Evans v. Fisher, 5 Gilm. 569.]

(3) The wife of the King of England "is of capacity to grant and to take, sue and be sued, as a *feme sole*, at the common law."

(4) The wife of a man *civiliter mortuus* has similar rights. Civil death arises from outlawry, or from being under conviction for felony, and formerly from being "professed in religion."

(5) By the custom of the City of London a married woman may trade, and may for that purpose make valid contracts. She cannot bring or defend an action upon these, unless her husband is joined with her as a party, but she does not thereby involve her husband in her trading liabilities. (a)

(a) [The common law is modified so variously upon this subject

Separate
estate in
equity.

Picard v.
Hine, L. R. 5
Ch. 277.

3 D. F. & J.
494

*110 (5) Property may in equity be settled upon a married woman for her separate use. Such separate estate becomes liable upon separate engagements entered into by the married woman with reference to it: and the presumption appears to be extremely strong that every engagement entered into by a married woman is entered into with reference to her separate estate.

The law upon this subject is exhaustively set forth in the judgment of TURNER, L. J., in *Johnson v. Gallagher*. "Courts of Equity," he says, "have through the medium of trusts created for married women rights and interests in property, both real and personal, separate from and independent of their husbands. *To the extent of the rights and interests thus created* a married woman has, in Courts of Equity, power to alienate, to contract, to enjoy. She is considered a *feme sole* in respect of property thus settled or secured to her separate use."

It is only to the extent of the rights and interests which are created for her, that a married woman can bind herself, or rather her estate, for equity does not, any more than law, allow her to bind herself by contract. The remedy given to the creditor is not given against her but against her estate. "When she

*111 by entering into an agreement allows the supposition to be made that she intends to perform the agreement out of her property, she creates a debt which may be recovered, *not by reaching her, but by reaching her property.*"

Per Lord
Hatherly in
Picard v.
Hine, L. R. 5,
Ch. 277.

How far a
real excep-
tion.

The liabilities, therefore, which attach to the separate estate of married women are hardly to be numbered among the genuine exceptions to the incapacity of married women to bind themselves by contract.

by statute that we can only refer the reader to the statutes of the different States. The tendency of the legislation is to clothe married women with the same rights to contract as if sole.]

But the separate estate, whether statutory or equitable, does furnish an exception to the general rule to this extent, that in virtue of it a married woman can by her independent agreement create an obligation, although the obligation binds her property and not herself.

§ 4. Corporations.

A corporation is an artificial person created by law. Hence the limitations to the capacity of a corporation for entering into a contract may be divided into necessary and express. The very nature of a corporation imposes some necessary restrictions upon its contract-
ual power, and the terms of its incorporation may impose others.

1. Necessary limits to its contractual capacity.

A corporation is an artificial entity, apart from the persons who compose it; their corporate rights and liabilities are something distinct from their individual rights and liabilities, and they do not of themselves constitute the corporation, but are only its members for the time being. Since then a corporation has this ideal existence apart from its members, it follows that it cannot personally enter into contracts, it must contract by means of an agent. It "cannot act in its own person, for it has no person."

2. Ch. 83.

Cairns in Ferguson v.

Wilson, L. R.

Andover, etc., Turn-

pike Corp.

v. Hay, 7 Mass. 102.]

And the Common Law rule that a corporation can only contract under seal puts this further limit upon its contractual powers, that it cannot as a rule make negotiable instruments. (a) For by the law merchant an instrument under seal is not negotiable, and therefore, unless the making of bills of exchange and promissory notes be part of the ordinary business of a trading corporation, they cannot be made by these artificial persons.

*112

The express limitations upon the capacity of corporations must vary in every case by the terms of

(a) [See page 46, note.]

their incorporation. Much has been and still may be said as to the effect of these terms in limiting the contractual powers of corporations, but it is not a part of the objects of this book to discuss the doctrine of L. R. 7, H. L. "ultra vires." The question whether the terms of incorporation are the measure of the contracting powers of the corporation, or whether they are merely prohibitory of contracts which are inconsistent with them, was discussed in the much litigated case of the

L. R. 9, Exch. 224.

In Exch. Ch. *Ashbury Carriage Company v. Riche*, and the question was thus stated and answered by BLACKBURN, J.:

"I take it that the true rule of law is, that a corporation at Common Law has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has. And this is important when we come to construe the statutes creating a corporation. For if it were true that a corporation at Common Law has a capacity to contract *to the extent given it by the agent creating it and no further*, the question would be, Does the statute creating the corporation by express provision or necessary implication show an intention in the legislature to confer upon this corporation capacity to make the contract? But if a body corporate has, *as incident to it, a general capacity to contract*, the question is, Does the statute creating the corporation by express provision or necessary implication show an intention in the legislature to prohibit, and so avoid the making of a contract of this particular kind?"

The House of Lords appear not to have dissented from the view of the general powers of corporations expressed by BLACKBURN, J., but they differed from him and overruled his judgment upon the interpretation of

the statute under consideration; holding that a company incorporated under the Companies' Act of 1862 is so far bound by the terms of its memorandum of Association that it may make no con-

tracts which are either inconsistent with or foreign to the objects expressed in that memorandum. (a)

A contract made *ultra vires* is void; it is sometimes said to void on the ground of illegality, but Lord CAIRNS in the case above cited takes exception to this use of the term "illegality," pointing out that it is

ultra vires
not void for
illegality,
but for in-
capacity.

(a) [The courts of this country seem to differ upon the question as to what the penalty shall be if a corporation does an act not expressly authorized or prohibited by the charter.

In the case of *Grand Lodge v. Waddill*, 86 Ala. 313, the court held that a corporation could not recover even in the Common Courts on a contract whereby it lent a sum of money without authority and took a note for the repayment of the loan. In *Orr v. Lucy*, 2 Dougl. 230, the Supreme Court of Michigan held that the contract of a corporation unauthorized or prohibited by its charter is void, and this doctrine is also upheld by the Courts of Missouri in *Blair v. Perpetual Insurance Company*, 10 Mo. 559, and in *Matthews v. Union National Bank*, which was reversed on error by the Supreme Court of the United States. *Union Nat. Bank v. Matthews*, 98 U. S. 184. This doctrine seems to be carried to an extreme in New York in *Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 81; *North River Ins. Co. v. Lawrence*, 8 Wend. 482; and *Beach v. Fulton Bank*, 8 Wend. 578.

Another class of cases hold that even if a certain class of contract is prohibited by the act of incorporation, yet unless the act makes the contract unenforceable, that the defendant cannot defeat a recovery, but the government can only take advantage of the violation of the act by forfeiting the charter of the corporation. See *Union Nat. Bank v. Matthews*, 98 U. S. 184, *sup.*; *Wrotton v. Armot*, 3 Va. Law Journal, 223; *Southern Life Ins. & Trust Co. v. Lavier*, 5 Fla. 110; *The Bank v. Hammond*, 1 Rich, (S. C.) 281.

The Supreme Court of Illinois in *Fridley v. Bowen*, which was a case where a mortgage had been taken by a national bank in the name of one of its officers to secure a contemporaneous loan, held that taking the mortgage in the name of the officer was the same as though it had been taken in the name of the bank, and refused to enforce the security; but this doctrine is contrary to that of the Supreme Court of the United States in *Union Nat. Bank v. Matthews*, *sup.* It seems to be more consistent with justice not to allow an individual to refuse to repay money loaned to him merely because the corporation had no express power to make the loan.]

not the objects of the contracting parties, but the incapacity of one of them, that avoids the contract.

§ 5. *Lunatic and drunken persons.*

The contract voidable. The law with regard to contracts made with lunatics and persons in a state of intoxication may be said to be now settled as follows. The contract of a lunatic or drunken person is voidable at his option if it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing and that the other knew of his condition. [But contracts of lunatics for necessaries, if fair, can be enforced.] It seems doubtful, even in the case of

[Richardson v. Strong, 13 Irw. (N. C.) 106.] executory contracts, whether the transaction can be avoided on the ground of lunacy or drunkenness as against a contracting party who had no reason to suppose that he was dealing with an incapable person. (a) But it seems settled that where a contract has been executed in part, so that the parties cannot be restored to their former positions, proof of the actual insanity of one of the parties at the time of making the con-

[But see Gib-tract, unaccompanied by any proof that the other son v. Spoper, knew of his condition, will not suffice to avoid the 6 Gray, 279.] contract.

Thus in *Molton v. Camroux*, a lunatic purchased annuities of a society, paid the money, and died. His 2 Exch. 489; administratrix sued the society to recover back the 4 Exch. 17. money on the ground that the contract was *void*. The whether of lunatic; jury found that at the time of the purchase the vendee was insane, and incompetent to manage his affairs, but that there was nothing to indicate this to the

Company, and that the transaction was *bona fide*. It was held that the money could not be recovered. "The modern cases show," said 4 Exch. 19. *114 PATTISON, J., "that when that state of mind was

(a) But, see *Loomis v. Spencer*, 2 Paige, Chy. 6 N. Y. 158.
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unknown to the other contracting party, and no advantage was taken of the lunatic, the defense cannot prevail, especially where the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored to their original position."

A lunatic, so found by commission, is not therefore Per Lord Langdale, M.
absolutely incapable of contracting, but the presumption is very strong in such a case that the contract was R., Snook v.
not made during a lucid interval, and that the other 107. Watts, 11
contracting party was aware of the mental condition Beav. at p.
of the lunatic. (a) Hall v. Warren, 9 Ves.
605.

A contract made by a person in a state of intoxication or drunkenness may be subsequently avoided by him, but if confirmed is binding on him. In the case of *Matthews* L.R. 8 Exch. 132. *v. Baxter*, a man, while drunk, agreed at an auction to make a purchase of houses and land. Afterwards, when sober, he affirmed the contract, and then repented of his bargain, and when sued on the contract pleaded that he was drunk at the time he made it. But the Court held that although he had once had an option in the matter and might have avoided the contract, he was now bound by his affirmation of it. "I think," said MARTIN, B., "that a drunken man, when he recovers his senses, might insist on the fulfillment of his bargain, and therefore that he can ratify it so as to bind himself to a performance of it."

The rules of equity are in accordance with those of common law in this respect. Under such circumstances as we have described, Courts of Equity will decree specific performance against a lunatic or a person who entered into a contract when intoxicated, and will on similar grounds refuse to set aside their contracts.

(a) In New York and Massachusetts the presumption is held to be absolute. *Fitzhugh v. Wilcox*, 12 Barb. 235; *Leonard v. Leonard*, 14 Pick 280. But, see *Gangwere's Estate*, 14 Penn. St. 417.

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CHAPTER IV.

REALITY OF CONSENT.

THE next feature in the Formation of Contract which has to be considered is Genuineness or Reality of Consent; and the question which, under this head, recurs in various forms is this: Given an apparent Agreement, possessing the element of Form or Consideration, and made between parties capable of contracting, was the consent of both or either given under such circumstances as to make it no real expression of intention?

And where this question has to be answered in the affirmative there may be various causes for unreality of consent.

Mistake.

(i) The parties may not have meant the same thing; or one or both may, while meaning the same thing, have formed untrue conclusions as to the subject matter of the agreement. This is Mistake.

Misrepresentation.

(ii) One of the parties may have been led to form untrue conclusions respecting the subject-matter of the contract by statements innocently made, or facts innocently withheld by the other. This is Misrepresentation.

Fraud.

(iii) These untrue conclusions may have been induced by representations of the other party made with a knowledge of their untruth and with the intention of deceiving. This is Fraud.

Duress.

(iv) The consent of one of the parties may have been extorted from him by the other by actual or threatened personal violence. This is Duress.

(v) One of the parties may from circumstances be Undue influence. morally incapable of resisting the will of the other, so that his consent is no real expression *116 of intention. This is Undue Influence.

And first let us deal with Mistake.

1. MISTAKE.

We must preface our remarks on Mistake by calling Mistake of attention to a division of the subject which makes it distinct from fall into two distinct chapters of the law of Contract. mistake of Mistake may be Mistake of intention, or Mistake of expression. With the latter we have nothing to do here. As a general rule men are bound by what they say or write, and cannot be heard afterwards to say that their intentions were wrongly expressed; but in certain cases, where the parties have been genuinely agreed, and the terms in which their agreement is couched would hinder or pervert its operation, they are permitted to explain, or the courts are willing to correct, the error. This however is a part of the Interpretation of Contract. We are here concerned with its Formation, and have to consider how far Mistake will vitiate an apparently valid agreement.

The cases in which Mistake have this effect are exceptions to the general rule that a man is bound by an agreement to which he has expressed his assent in unequivocal terms uninfluenced by falsehood, violence or oppression. And it is perhaps safe to say that unless Mistake goes to the root of the contract, and is such as to negative the idea that the parties were ever *ad idem*, it will be inoperative. The cases in which Mistake does invalidate a contract may be conveniently dealt with under the following heads:

Mistake as to the nature of the transaction.

This must needs be of rare occurrence, for men are Mistake as
125

to nature of
transaction.

*117 not apt to enter into engagements as to the nature of which they are wholly in the dark. It must also arise almost of necessity from the misrepresentation of a third party. For if a man be capable of understanding the nature of a document, he cannot avoid its operation by saying that he did not apply his mind to its contents, or that he did not suppose that it would have any legal effect. He must therefore have been induced to contract by some deceit which ordinary diligence could not penetrate. And this, in order to result in Mistake, must, *ex vi termini*, proceed from some third party, for otherwise the contract would be voidable for misrepresentation or fraud, and would not be void on the ground of Mistake.

Illustrations. The two following cases will be found to furnish the best illustrations of Mistake of this nature. In *Thoroughgood's* case the plaintiff executed a deed which he was told was a release of arrears of rent, though in fact it was a release of all claims. He was an illiterate man, the deed was not read to him, and when its effect was misrepresented to him in the manner described, he said, "if it be no otherwise I am content," and executed the deed. It was held that the deed was void.

L. R. 4 C. P. 704. [New-
citt v. Jones,
72 Ill. 218.] In *Foster v. Mackinnon* the acceptor of a bill of exchange induced the defendant to indorse it, telling him that it was a guarantee. The plaintiff was a subsequent *bona fide* indorsee of the bill, for value. It was held that the defendant's signature did not bind him. The court said that it was "plain on principle and on authority that if a blind man or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the sig-

nature so obtained is of no force. And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that *the mind of the signer did not accompany the signature;* in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended."

But it will be noted that the absence of negligence is strongly dwelt upon by the court, and that the jury had expressly negatived its existence in the circumstances of this particular case. *Hunter v. Walters* L. R. 7 Ch. 84. [Holmes v. Hale, 71 Ill. 552.] seems to show that if a man executes a deed which he might have read and was capable of understanding, he cannot avoid it on the ground that he did not read it or was misinformed of its contents and intended application, or that he understood that it was a mere form.

Mistake as to the person with whom the contract is made.

Mistake of this nature arises where A enters into a contract with X under the belief that he is entering into a contract with M. It can only arise where A has in contemplation a definite person with whom he desires to contract, it naturally cannot affect general offers which any one may accept, as, for instance, contracts by advertisement, or sales for ready money.

But where A intends to contract with M, X cannot give himself a right under the contract by substituting himself for M. And the reason for this rule is tolerably clear. When one man enters into a contract with another, he generally has some reason for dealing with that man in preference to others; his character, his solvency, or the convenience of dealing with him, may be important elements in the motive which induced the contract. If, then, where A intends to contract with M, X substitutes himself for M, A not only loses

whatever advantages he expected to gain by dealing with M in preference with others, but he is not a consenting party to the contract.

*119 Thus in a case in which X, by imitating the signature of M, induced A and B to supply him with goods under the belief that they were supplying M, it was held that no contract had ever arisen between A and B and X. "Of him," says Lord CAIRNS, "they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever. As between *him and them* there was merely *the one side to a contract, where, in order to produce a contract, two sides would be required.*"

Cundy v.
Lindsay, L.
R. 3 App.
Cas. 465.
(18 Alb. L.
Jour. 58.)
2 Monthly
Jurist, 148.

2 H. & N.
504

Per Chan-
nell, B.

In the case referred to, the mistake was induced by fraud, but the case of *Boulton v. Jones* shows that innocent mistake may produce the same effects. There the plaintiff succeeded to the business of one Brocklehurst with whom the defendant had been accustomed to deal. The defendant sent an order for goods to Brocklehurst, and the plaintiff supplied the goods without any notification of change. It was held that he could not recover their price. "In order to entitle the plaintiff to recover he must show that there was a contract with himself." (a)

And it will be remarked that this was not like a case of an offer made by sending the goods and accepted by the use of them, else the defendant would have been liable for their price: but it was the acceptance by the plaintiff of a proposal addressed to Brocklehurst, so that the defendant had not the option of refusing an offer made by the plaintiff, but was allowed by him to act upon an acceptance which he supposed to have pro-

(a) [In this case Brocklehurst was indebted to defendant, who claimed that he had the right to set off the debt against the claim.]

ceeded from Brocklehurst. It may therefore be laid down that where X, without any fraudulent intention, substitutes himself for M so that A contracts with X under the belief that he is contracting with M, the contract is void. If the Mistake be induced by the fraud of X, certain consequences flow from it, other than those in ordinary cases of fraud, and *120 these shall be noticed hereafter.

Mistake as to the subject matter of the contract.

It is in cases of mistake of this nature that really difficult questions arise. If a man can show that, without any fault of his own, he has entered into a contract of a nature wholly different to anything that he intended, it is not difficult to see that the element of consent is entirely wanting in such a transaction. If, while intending to contract with A, he has been subjected to a substitution of X for A as the party with whom the contract is made, it is again obvious that there has been no community of intention between him and X. But when two persons, intending to bind themselves to one another by a contract of a particular kind, carry out that intention, Mistake as to the subject matter of the contract can seldom affect their rights.

Where a man has entered into an explicit agreement why generally inoperative. the nature of which he understood, he cannot be heard to say that his meaning is not expressed by his words, and that he intended and expected to bargain for something different to that which his words would naturally indicate. Contracts would never be concluded if indefinite variations of meaning could be introduced by subsequent explanation, and so it may be taken to be a general rule that the unconditional acceptance of an explicit proposal binds both parties, even though they may show that they meant something different to what they said or wrote. "If, whatever a man's real inten-

Per Blackburn, J., in *Smith v. Hughes*, L. R. 6. Q. B., at p. 607. [Referring to Story on Contracts, Sec. 618.]

tion may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

*121 Mistake as to the subject matter of a contract will only avoid it in three cases.

- (a) Mistake as to the existence of the subject matter.
- (b) Mistake as to the identity of the subject matter.
- (c) Mistake of one party known to the other, as to the quality of the thing promised.

Mistake as to existence of subject matter

(a) *Mistake as to the existence of the subject matter of a contract.*

may amount to antecedent impossibility.

If A agrees with X in respect of a thing which, unknown to both parties, is non-existent at the time of entering into the contract, the mistake goes to the root of the matter and avoids the contract. Such mistake is in fact a phase of the subject of impossibility of performance. But, inasmuch as the thing agreed upon has ceased to be possible before the agreement was made, such impossibility prevents a contract from ever having arisen and does not operate, as impossibility arising subsequent to the contract will sometimes operate, as a form of discharge. One of the leading cases on this subject is *Couturier v. Hastie*, arising out of the sale of a cargo of corn which was supposed by the parties to be, at the date of sale, on its voyage from Salonica to England, but which had in fact, prior to the date of sale, become so heated on the voyage that it had to be unloaded and sold. It was held that the contract was void, inasmuch as it "plainly imports that there was something which was to be sold at the time of the contract and something to be pur-

5 H. L. C. 673. [Allen v. Ham mond, 11 Pet. 63.]

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chased," whereas the object of the sale had ceased to exist.

So too in *Strickland v. Turner*, the plaintiff pur-^{7 Exch. 217.} chased an annuity which at the time of purchase had already failed owing to the death of the annuitant. It was held that he could recover the price which he had paid for the annuity.

In cases where the non-existence of a right is concerned, it may be suggested that mistake of this nature of a right is mistake of law, and that to allow a man to avoid a contract on the ground that he mistook his

right is an infringement of the rule *ignorantia *122*

juris hanc excusat. But a distinction is drawn

by Lord WESTBURY in *Cooper v. Phibbs*, which was a L. R. 2 H. case of mistaken rights, between two senses in which

L. 170.

the word *jus* is used with reference to that rule. "It is said *ignorantia juris hanc excusat*; but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake."(a)

(b) *Mistake as to the identity of the subject matter of a contract.*

An agreement may be void on the ground of mistake where two things have the same name, and the two parties enter into contract in which each means a

(a) [This doctrine seems to be upheld by the case of *Fitzgerald v. Peck*, 4 Litt. (Ky.) 125, though the weight of authority seems to be the other way. See note a page 148, *post.*]

different thing, while, owing to the identity of the names of the things, the same terms apply to the meaning of each party.

Under such circumstances there is a mistake in the identity of the thing contracted for, the minds of the parties really never meet, and there is no true consent. Thus where A agreed to buy of X a cargo of cotton "to arrive ex Peerless from Bombay," and there were two ships of that name, and the buyer meant one and the seller the other, it was held that there was no contract, and that the buyer was not bound to accept a cargo which, though it came "ex Peerless from Bombay," did not come in the vessel of that name which was present to his mind when he made the agreement.

Raffles v.
Wickehaus,
2 H. & C.
906. [See
Kyle v. Kavanagh, 103
Mass. 356.]

distinct from
mere confu-
sion

It is clear that if the buyer had meant a ship of a different name he would be bound by the terms

*123 of his contract; for unless the description of the subject matter of the contract admits of more meanings than one, the party setting up mistake can only do so by showing that he meant something other than that which he said; and this, as we have seen, he may not do. On the other hand, the case of or misnomer. *Ionides v. The Pacific Insurance Company* shows L. R. 6 Q. B. that a mere misnomer of the subject of the contract will not entitle either party to avoid it if its contract itself contains such a description of the subject matter as practically identifies it.

(c) *Mistake as to the quality of the thing promised, known to the party promising.*

Mistake as
to quality of
thing prom-
ised.

This is the only form in which mistake as to the quality or quantity of the thing promised can affect the validity of a contract. All other instances in which a contract has been avoided at law, or refused specific performance in equity, seemingly on the ground of mistake as to quantity or quality of the thing promised are either cases in which the proposal and accept-

ance never agreed in terms; or cases in which equity will not exact the performance of a promise offered in terms which are the result of a manifest inadvertence, but leaves the parties to their legal rights and remedies. Thus where A offered to sell an estate to X, but by a mistake in adding up the prices of the various plots offered it for £1,000 less than he meant, the court would not enforce the contract. But it does not follow from this that the plaintiff could not have recovered at law such damages as he might have sustained.

Thornton v.
Kenster, 5
Taunt. 786.
Webster v.
Cecil, 80
Beav. 62.
[Western R.
R. v. Bab-
cock, 606
Met. 846.]

The quantity of an article bought, or the price to be paid for it, are points not usually misstated by contracting parties, but their statements must be taken to be conclusive against themselves. The quality of the article is a matter which the parties must look to themselves: they cannot ask courts of law to correct their errors of judgment.

That an article should come up to a certain standard of quality must be the subject of express warranty. Where the buyer is unable to inspect the thing purchased, the law protects him by the introduction of implied warranties, which secure to him in substance that he shall obtain the kind of thing he bargained for, and that of a marketable quality; but anything more than this must be a question of terms. If the buyer cannot inspect the article before purchase, he must protect himself by the terms of his bargain; if he can inspect it, he must exercise his judgment; and if he has no confidence in his own judgment, he may further seek to bind the seller by terms. A seller is not bound to depreciate his wares even though he knows that the buyer is forming an undue estimate of their quality.

*124 Responsibility of buyer as to quality.
Jones v. Just,
L. R. 3 Q. B.
at p. 205.
[Babcock v.
Trice, 18 Ill.
420.]

Nor is the seller affected by such impression as the buyer may form of the nature of his promise. If the buyer thinks he is being promised a quality of article

which the seller does not intend to warrant, the contract will nevertheless hold. If the buyer wants to bind the seller to supply an article of a particular quality he should make it a term of the contract. But if the seller knows that the buyer understands his promise in a different sense from that in which he gives it, the case is different. The contract is void because the apparent consent indicated by the agreement of the parties to common terms is shown to be unreal, by the fact that one of the parties knew the difference of intention between himself and the other.

Let us illustrate these propositions by an imaginary sale:

Illustrations. A sells X a piece of china.

(a) X thinks it is Dresden china, A thinks it is not. Each takes the consequences. X may get a better thing than A intended to sell, or he may get a worse thing than he intended to buy, and in neither case is the validity of the contract affected.

*125 (b) X thinks it is Dresden china. A knows that X thinks so, and knows that it is not.

The contract holds. So long as A does nothing to deceive X, he is not bound to prevent X from deceiving himself as to the *quality* of the article sold.

(c) X thinks it is Dresden china and thinks that A intends to sell it as Dresden china; and A knows it is not Dresden china, but does not know that X thinks that he intends to sell it as *Dresden* china. The contract says nothing of *Dresden* china, but is for a sale of china in general terms.

The contract holds. The misapprehension by X of the extent of A's promise, unknown to A, has no effect. It is not A's fault that X omitted to introduce terms which he wished to form part of the contract.

(d) X thinks it is Dresden, and thinks that A intends to sell it as Dresden china. A knows that X

thinks *he is promising Dresden china*, but does not mean to promise china more than in general terms.

The contract is void. X's error was not one of judgment, as in (b,) but regarded the intention of A, and A, knowing that his intention was mistaken, allowed the mistake to continue.

The last instance given corresponds to the rule laid down in *Smith v. Hughes*. In that case the defendant was sued for refusing to accept some oats which he had agreed to buy of the plaintiff, on the ground that he had intended and agreed to buy old oats, and that those supplied were new. The jury were told that if the plaintiff knew that the defendant *thought he was buying old oats*, then he could not recover. But the Court of Queen's Bench held that this was not enough to avoid the sale; that in order to do so the plaintiff, must have known that the defendant *thought he was being promised old oats*. It was not knowledge of the misapprehension of the *quality* of the oats, but the misapprehension of the *quality promised*, which would disentitle the plaintiff to recover.

In his judgment in this case, BLACKBURN, J., *126 Mistake of lays down the law upon the subject thus: "In buyer as to this case I agree that on the sale of a specific article, quality not unless there be a warranty making it part of the bar- known to gaign that it possesses some particular quality, the pur- buyer. chaser must take the article he has bought though it seller. does not possess that quality." (This is instance a.)

"And I agree that even if the vendor was aware Mistake of that the purchaser thought the article possessed that buyer as to quality, and would not have entered into the contract known to quality seller. [But unless he had so thought, still the purchaser is bound, see Living- unless the vendor was guilty of some fraud or deceit ton v. Peru Iron Co. 2 upon him, and that a mere abstinence from abusing Paige, 390.] the purchaser of that impression is not fraud or deceit; for whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform

the purchaser that he is under a mistake, not induced by the act of the vendor." (This is instance b.)

Mistake of
buyer as to
quality
promised not
known to
seller.

8 E. & B. 815. error of the vendor." *Scott v. Littledale.*¹ (This corresponds to instance c.)

Mistake of
buyer as
to quality
promised
known to
seller.

And further he says: "If in the present case, the plaintiff knew that the defendant, in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware

that the defendant apprehended the contract in
***127** a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the defendant shall be bound by that which was the apparent, and not the real bargain. (This corresponds to instance d.)

30 Beav. 445. In the case of *Garrard v. Frankel* the point insisted on in *Smith v. Hughes* arose in equity. The plaintiff and defendant signed a memorandum of agreement by

which the plaintiff promised to let certain premises to the defendant *at the rent of £230 in all respects on the terms of the within lease;* and this memorandum accompanied a draft of the lease referred to. The plaintiff, in filling in the blank in the draft for the amount of rent to be paid, inadvertently entered the figures £130 instead of £230; and the lease was engrossed and executed

¹ This case puts, from the seller's point of view, the principle which we have been illustrating from the point of view of the buyer. The seller means to promise one thing; he in fact promises another; the fact that he thinks he is promising something less than he does promise has no effect on the validity of the sale.

with this error. The Court was satisfied, upon the evidence, that the defendant was aware of the discrepancy between the rent which she was promising to pay and the rent which the plaintiff believed her to be promising to pay; and she was given the option of retaining the lease, amended so as to express the real intention of the parties, or giving it up, paying at the rate of £230 per annum for such use and occupation of the premises as she had enjoyed.

The rule which these two cases establish comes in substance to this: that where there is mistake, not as to the subject matter of the contract, but as to the terms of the contract, and one party "*being at the time* Per Romilly,
cognizant of the fact of the error, seeks to take ad- M. R. in
vantage of it," the contract will be treated as void Garrard v.
Frankel.
both in law and equity.

80 Beav. 451.

The effect of Mistake, where it has any operation at all Effects of
is to avoid the contract. The Common Law therefore mistake.

offers two remedies to a person who has entered into an
agreement void on the ground of Mistake. If it be still
executory he may repudiate it and successfully defend
an action brought upon it; or if he have paid money
under the contract, he may recover it back upon
the general principle that "where money is paid

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to another under the influence of a mistake, that Kelly v.
is, upon the supposition that a specific fact is true Solari, 9 M.
which would entitle the other to the money, but which & W. 58.
fact is untrue, an action will lie to recover it back." [Wheaton v.
Olds, 20 Wend. 174.]

In equity the victim of mistake may resist specific
performance of the contract, and may sometimes do Webster v.
so successfully when he might not have been able to Cecil, 80
defend at law an action for damages arising from his Beav. 62.
breach. He may also as plaintiff apply to a court of
equity to get the contract declared void and to be
freed from his liabilities in respect of it.

§ 2. MISREPRESENTATION.

Misrepresentation not easy to distinguish from fraud: The subject of misrepresentation is beset with various difficulties. One difficulty arises from the wide use of the term Fraud to cover misrepresentations of fact which vary very widely in their nature and consequences.

or from condition. Another difficulty arises from the desire of the Courts to exclude mere representations which do not form part of the terms of a contract from all effect upon its validity. If a representation is to affect the formation or discharge of a contract it must either be made with a fraudulent motive, or it must occur in the case of certain special contracts, or it must be a term or integral part of the contract.

And this brings us to the third difficulty. If a representation forms an integral part of a contract it is virtually placed on a level with a promise. If it turns out to be false its untruth does not affect the formation of the contract, but operates either to discharge the injured party from his liabilities or to give him a right of action as upon the failure of a promise.

We have, therefore, to distinguish representation, whether innocent or fraudulent, which affects the validity of a contract, from representation which affects the performance of a contract. And the termin-

*129 ology of this part of the subject is extraordinarily confused. Representation, condition, warranty, independent agreement, implied warranty, warranty in the nature of a condition, are phrases which it is not easy to follow through the various shades of meaning in which they are used.

It will perhaps clear the ground if we begin with three general statements which attempt to meet the three difficulties suggested.

(a) The practical test of fraud as opposed to misrepresentation is that the first does, and the second does

General rules.

not, give rise to an action *ex delicto*. The first is a wrong, and may be treated as such, besides being a vitiating element in contract. The second may invalidate a contract but will not give rise to the action *ex delicto*, the action of deceit.

(b) Misrepresentation made prior to the formation of a contract, not constituting a term in the contract, will only affect its validity in certain special cases. These are contracts of marine or fire insurance, contracts for the sale of land, and contracts for the purchase of shares in companies.

(c) Where representations made prior to the conclusion of a contract have any effect, they affect the formation of the contract and make it voidable. Where statements which form part of the contract turn out to be false they entitle the party to whom they were made, either to rescind the contract and be discharged from it, or to bring an action for a breach of one of its terms. In the one case the contract has never been effectually formed, in the other it has been formed and broken.

Let us now consider these statements more in detail.

(1) The distinction which has been suggested between fraud and misrepresentation is practical rather than scientific: we describe them not by their nature but by their results. The procedure open to the injured party is made the test of the character of the act by which he is injured. But rights are sometimes *130 to be found most clearly defined in the remedies which exist for the breach of them; and the exactitude of the pleadings now disused is often a valuable aid to the ascertainment of the legal relations of the parties. Fraud is a wrong apart from contract, and damages arising from it may be recovered in the action of deceit. But fraud which gives the action of deceit need not involve dishonest motives where there is a

knowledge that the statement made is false; nor if dishonest, or at any rate self-seeking, motives be present is it necessary that there be a clear knowledge that the statement made is false.

Per Tindal,
C. J., *Foster v. Charles*, 7
Bing. 105.

3 B. & Ad.
114.
Fraud without dishonest motive.
[Story on
Con. Sec.
632.]

"It is fraud in law if a party make representations which he knows to be false and injury ensues, although the motives from which the representation proceeded may not have been bad." Thus in *Polhill v. Walter* the defendant accepted a bill of exchange drawn on another person representing himself to have authority from that other to accept the bill, and honestly believing that the acceptance would be sanctioned, and the bill paid by the person for whom he professed to act. The bill was dishonored at maturity, and an indorsee, who had given value for the bill on the strength of the defendant's representation, brought against him an action of deceit, or in the more familiar language of modern pleading, sued him for false and fraudulent misrepresentation. It was held that he was liable, and Lord TENTERDEN in giving judgment said: "If the defendant, when he wrote the acceptance, and, thereby in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did,) the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence." It will be observed that in this case there was a representation of facts known to be false; that the knowledge of the untruth of the statement

was the ground of the decision: it is therefore *131 clearly distinguishable from a class of cases in which it has been held, after some conflict of judicial opinion, that a false representation believed to be true by the party making it will not give rise to the action of deceit.

It is not necessary, however, to constitute fraud,

See Benjamin on Sales, Am. Ed. page 389. [*Mervin v. Ar-buckle*, 81 Ill. 501.]

that there should be a clear knowledge that the statement made is false. Statements which are intended to be acted upon, if made recklessly, and with no reasonable ground of belief, bring their maker within the remedies appropriate to fraud.

The Westeran Bank of Scotland v. Addie was an action of deceit brought against a company by a shareholder who had been deceived by a report of the directors and suffered loss. The House of Lords held that such an action must be brought against the directors and could not be brought against the company, for a reason to be explained hereafter; but Lord CHELMSFORD held that "if the directors took upon themselves to put forth in their reports statements of importance in regard to the affairs of the bank, false in themselves, and which they did not believe or *had no reasonable ground to believe* to be true, that would be a misrepresentation and deceit." Lord CRANWORTH, in giving judgment in the same case, qualifies the force of this proposition, expressing an opinion that it goes too far, but it is substantially confirmed by Lord CAIRNS in a later case, in which he lays it down as the settled rule of law that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or not, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue.

If then neither the intent to defraud nor deliberate assertion of untruth are necessary elements in fraud, the nearest approach which we can make to a distinction between misrepresentation and fraud is that the former is an innocent misstatement of facts, while the latter consists in representations known to be false, or made in such reckless ignorance of their truth or falsehood as to entitle the injured party to the action of deceit.

Innocent misstatement does not invalidate contract unless (1) the contract be of a special class;

or (2) it amount to a condition.

3 B. & S. 751. of *Behn v. Burness*.

(2) In dealing with innocent misrepresentation and non-disclosure of fact, we may say generally that unless they occur in the particular kinds of contract already mentioned they do not affect the validity of consent. The strong tendency of the courts has been to bring, if possible, every statement which, from its importance could affect consent, into the terms of the contract. If a representation cannot be shown to have had so material a part in determining consent as to have formed, if not the basis of the contract, at any rate an integral part of its terms, such a representation is set aside altogether. Most contracts are of a somewhat complex character, and consist of statements that certain things are, and promises that certain things shall be. It is here that difficulties begin. If a representation is not part of a contract, its truth, except in the excepted cases and apart from fraud, is immaterial. If it be part of a contract it receives the name of a Condition or a Warranty, its untruth does not affect the formation of the contract but operates to discharge the injured party from his obligation, or gives him a right of action, *ex contractu*, for loss sustained by the untruth of a statement which is regarded in the light of a promise. We shall get a clearer notion of these various phases of representation from the case

The action was brought upon a charter party dated the 19th day of Oct., 1860, in which it was agreed that the plaintiff's ship *then in the port of Amsterdam* should proceed to Newport and there load a cargo of coals which she should carry to Hong Kong. At the date of the contract the ship was not in the port of Amsterdam and did not arrive there until the 23rd. When she reached Newport the defendant refused to load a cargo and repudiated the contract, upon which action was brought. The question for the court

*133 was whether the words *now in the port of*

Amsterdam amounted to a condition the breach of which entitled the plaintiff to repudiate the contract, or whether they only gave him a right, after carrying out the contract, to sue for such damages as he had sustained. WILLIAMS, J., in giving judgment in the Exchequer Chamber, thus distinguishes the various parts or terms of a contract:

“ Properly speaking, a representation is a statement made by one party to the other, before or term in contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events, marine policies, which stand on a peculiar anomalous footing) *is such untruth any cause of action, nor has it any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue....* Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question, however, may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the Court and not the jury must determine. If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation

of the contract, but will only be a cause of action for a compensation in damages.

*134 "In the construction of charter parties, this question has often been raised, with reference to stipulations that some future thing shall be done or shall happen, and has given rise to many nice distinctions. Thus a statement that a vessel is to sail, or be ready to receive a cargo, on or before a given day, has been held to be a condition, while a stipulation that she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement.

Glaholm v.
Hays, 2 M.
& G. 237.
Seeger v.
Duthie, 8 C.
B. N. S. 45.

Tarrabochia
v. Hickie, 1
H. & N. 183.

"But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages."

The Court ultimately held that the statement that the ship was in the port of Amsterdam at the time of making the contract was intended by the parties to be a Condition, and that the breach of it discharged the charterer from the obligation to perform what he had promised.

The judgment in this case has been cited at some
144

length, not only because it is the fullest judicial analysis of the terms of a contract, but also because it affords a good illustration of the provoking confusior of the terminology of this part of the subject.

It will be observed that Condition is used in two senses, as meaning a statement that a thing is, and a promise that a thing shall be; in either case the statement or promise is of so important a nature that the untruth of the one or the breach of the other discharges the contract.

Warranty also is used in several senses. It is first made a convertible term with a Condition; it is then used "in the narrower sense of the word," in which sense it means (1) a subsidiary promise in the contract, the breach of which could under no circumstances do more than give rise to an action for damages, and (2) a Condition the breach of which might have discharged the contract had it not been so far acquiesced in as to lose its effect for that purpose, though it may give rise to an action for damages.

Yet in spite of this verbal confusion the judgment gives us a clear idea of the various terms in a contract.

(a) *Representations*, made at the time of entering into the contract but not forming a part of it, may affect its validity in certain special cases but are otherwise inoperative. When they do operate their falsehood prevents the contract from ever having been effectnally formed.

(b) *Conditions* are either statements, or promises which form the basis of the contract. Whether or not a term in the contract amounts to a Condition must be a question of construction, to be answered by ascertaining the intention of the parties from the wording of the contract and the circumstances under which it was made. But when a term in the contract is ascertained to be a Condition, then, whether it be a statement or a promise, the untruth, or the breach of it,

will entitle the party to whom it is made to be discharged from his liabilities under the contract.

*Warranty
ab initio.*

(c) *Warranties*, used in "the narrower sense," are independent subsidiary promises, the breach of which does not discharge the contract, but gives to the *136 injured party a right of action for such damage as he has sustained by the failure of the other to fulfill his promise.

*Warranty
ex post facto.*

(d) A condition may be broken and the injured party may not avail himself of his right to be discharged, but continue to take benefit under the contract, or at any rate to act as though it were still in operation. In such a case the condition sinks to the level of a warranty, and the breach of it, being waived as a discharge, can only give a right of action for the damage sustained.

We have dwelt thus at length upon a subject which would seem to be more appropriately discussed under the head of Discharge of Contract, because it appeared necessary to point out the distinction between the Representation which in special cases affects the validity of a contract, and Statements which are introduced into the terms of the contract as Conditions, the untruth of which operates as a discharge. And it will be well before leaving this part of the discussion to illustrate by another case the desire of the Courts to include within the terms of the contract every statement of fact, which, apart from fraud, is in any way to affect it.

Bannerman
v. White, 10
C. B. N. S.
844.

Representa-
tion made
anterior to
contract:
held a con-
dition.

The case of *Bannerman v. White* arose out of a sale of hops by the plaintiff to the defendant. Before commencing to deal for the hops the defendant asked the plaintiff if any sulphur had been used in the treatment of that year's growth of hops. The plaintiff said "no." The defendant said that he would not even ask the price if any sulphur had been used. After this the parties discussed the price and the defendant

agreed to purchase the growth of that year. He afterwards repudiated the contract on the ground that sulphur had been used in the treatment of the hops. The plaintiff sued for their price. It was proved that sulphur had been used by the plaintiff over five acres, the entire growth consisting of 300 acres. He had used it for the purpose of trying a new machine, had afterwards mixed the whole growth together, and had either forgotten the matter or thought it unimportant. The jury found that the representation made by the plaintiff as to the use of sulphur was not willfully false, and they further found that "the affirmation that no sulphur had been used was intended by the parties to be part of the contract of sale, and a warranty by the plaintiff." The Court had to consider the effect of this finding, and came to the conclusion that the representation of the plaintiff was a part of the contract and a preliminary condition, the breach of which entitled the defendant to be discharged from liability.

ERLE, C. J.; said, "We avoid the term *warranty* because it is used in two senses, and the term *condition* because the question is whether that term is applicable, then, the effect is that the defendants required and that the plaintiff gave his *undertaking* that no sulphur had been used. This undertaking was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted; and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used.

"The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded; or the sale may be conditional, to

be null if the warranty is broken. And, upon this statement of facts, we think that the intention appears that the contract should be null if sulphur had been used: and upon this ground we agree that the rule should be discharged."

It is worth noticing with regard to these words— Firstly, that the Chief Justice notes the confusion which has arisen from the double meaning of the word *Warranty*; and further expresses a doubt whether the term *Condition* is applicable to a statement such as the one in question. Secondly, that the introduction of the representation into the contract *138 as one of its conditions shows more markedly than the judgment in *Behn v. Burness* that statements, which go to the validity of a contract, are placed on a level with promises. For in the one case the statement was definitely introduced into the charter party, in the other it was made even before the parties commenced bargaining.

The determination of the Courts to exclude representations from affecting a contract unless they form a part of its terms, is an instance of the practical wisdom which marks the English Law of Contract. The process of coming to an agreement is generally surrounded by a fringe of statement and discussion, and the Courts might find their time occupied in endless questions of fact if it were permitted to a man to repudiate his contract, or bring an action for the breach of it, upon the strength of the words used in conversation preceding the agreement. When, therefore, the validity of a contract is called in question, or the liabilities of the parties said to be affected by reason of representations made at the time of entering into the contract, the effect of such representations may be said to depend on the answer that can be given to three questions— 1. Were the statements in question a part of the terms of the contract? 2. If not, were they made

fraudulently? 3. If neither of these, was the contract, in respect of which they were made, one of those which we will call for convenience contracts *uberrimæ fidei*? If all these questions are answered in the negative, the representation goes for nothing.

(3) One result of this introduction into the body of a contract of such statements as are allowed to be operative is that their untruth, instead of being a vitiating element in the Formation of contract, becomes a form of Discharge. We have therefore to distinguish between Misrepresentation which makes a contract *voidable* because entered into under such circumstances as preclude true consent, from a failure of a descriptive statement which amounts to a *139 breach of contract, either *discharging* the injured party or giving him a *right of action* for damages sustained.

The difference is not of any great practical importance, though it somewhat interferes with a systematic arrangement of the subject. In the one case the parties have never been completely bound to one another for want of genuineness of consent: in the other case there has been a *vinculum juris* in all respects complete; it has been broken, and one of the parties, if he so please, is discharged, and a new obligation, a right of action, takes the place of the old one.

In the case of such a Condition as that in *Behn v. 3 B. & S.* 751 *Burness*, it would have seemed to accord more truly with the attitude of the parties if the defendant were allowed to say "you told me that your vessel was at Amsterdam; if I had not thought it was there I would not have contracted with you: my consent was obtained by misrepresentation of material facts and so was unreal. I never really contracted at all." But instead of this he is made to say, "in stating that your ship was at Amsterdam you must be supposed to have prom-

ised me that if it was not there I should be discharged: it was not there and I am discharged." As regards the rights of the parties the difference is not very material, but it would have been simpler to attach the natural meaning to the words of men, and better to have avoided the introduction of implied conditions and warranties which are apt to give a air of unreality and artifice to the subject of the fulfillment and breach of contract.

Contracts affected by Misrepresentation.

*Contracts
uberrimæ
fidei.*

It remains to consider the special contracts which are affected in their formation by misrepresentation or non-disclosure. These are contracts sometimes said to be *uberrimæ fidei*, and their characteristics in *140 this respect is that one of the parties must, from the nature of the contract, rely upon statements made by the other, and is placed at a disadvantage as regards his means of acquiring knowledge upon the subject.

(a) Contracts of marine and fire insurance.

*Marine in-
surance.*

Per Black-
burn, J., in
*In Ionides v.
Pender, L.
R. 9 Q. B.
537.* [Lewis
v. Eagle Ins.
Co., 10 Gray
508.]

In the contract of marine insurance the insured is bound to give the underwriter all such information as would be likely to determine his judgment in accepting the risk; and misrepresentation or concealment of any such matter, though unaccompanied by fraudulent intention, avoids the policy. "It is perfectly well established that the law as to a contract of insurance differs from that as to other contracts, and that a concealment of a material fact, though made without any fraudulent intention, vitiates the policy." So in the case here quoted, where goods were insured upon a voyage for an amount considerably in excess of their value, it was held that although the fact of over-valuation would not affect the risks of the voyage, yet being a fact which underwriters were in the habit of taking into consideration, its concealment vitiated the policy.

In the contract of fire insurance the description of Fire insurance. the premises appears to form a representation on the truth of which the validity of the contract depends. American authorities go further than this, and hold that the innocent non-disclosure of any material fact vitiates the policy. In a case quoted by BLACKBURN, J., in the judgment above cited, "the plaintiffs had New York Bowery Fire Insurance Co. v. New York Fire Insurance, 17 Wend. 359. insured certain property against fire, and the president of the company heard that the person insuring with them, or at least some one of the same name, had been so unlucky as to have had several fires, in each of which he was heavily insured. The plaintiffs reinsured with the defendants, but did not inform them of this. A fire did take place, the insured came upon the plaintiffs, who came upon the defendants. The judge directed the jury, that if this information given to the president of the plaintiffs was intentionally kept back, it would vitiate the policy of reinsurance. The jury found for the plaintiffs, but the Court, on appeal, directed a new trial on the ground that the concealment was of a material fact, and whether intentional or not, it vitiates the insurance."

The contract of life insurance differs from those of marine and fire insurance in this respect. Untruth in the representations made to the insurer as to the life insured will not affect the validity of the contract unless they be made fraudulently, or unless their truth be made an express condition of the contract. Thus in *Wheelton v. Hardisty*, an insurance office was held liable on a policy entered into on representations falsely and fraudulently made by a third party as to the health and habits of the person whose life was insured, which representations were made to the person insuring the life and innocently supplied by him to the insurance office. The Court of Exchequer Chamber expressly distinguished the case from that of marine policies: "There is nothing in law," said WILLES, J.,

8 E. & B. 299. [See *Campbell v. New Eng. Land Ins. Co.* 98 Mass. 881.] "to make the truth of the statement a condition precedent to the liability of the defendants upon the policy, unless it were untrue to the knowledge of the plaintiffs, and therefore fraudulent: the mere untruth of it would not avoid any policy in which it was introduced, the policy containing no express stipulation to that effect." (I)

(b) Contracts for the sale of land.

Sale of land. In agreements of this nature a misdescription of the premises sold or of the terms to which they are subject, though made without any fraudulent intention, will vitiate the contract. A single instance will illustrate the operation, and the rationale of the rule. In *1 Bing. N. C. Flight v. Booth*, leasehold property was agreed to be purchased by the defendant. The lease contained restrictions against the carrying on of several trades, of which the particulars of sale mentioned only a few; and TINDAL, C. J., in holding that the plaintiff could recover back money paid by way of deposit on *142 the purchase of the property, said, "We think it is a safe rule to adopt, that where the misdescription although not proceeding from fraud, is, in a material and substantial point, so far affecting the subject-matter of the contract, that it may reasonably be supposed that, but for such misdescription the purchaser might never have entered into the contract at all: in such cases the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale; as in

(I) But, see *London Assurance v. Mansel*, 41 Law Times, 225, which says: "The M. R. was of the opinion that there was no difference in principle between a case of life insurance and fire, marine, or any other insurance, and that in all, the greatest good faith was required on the part of the proposer, and that in the case of the concealment of any material fact on his part, the contract would not be binding on the assurers."

Jones v. Edney, where the subject-matter of the sale^s Camp. 285. was described to be 'a free public house,' while the lease contained a proviso, that the lessee and his assigns should take all their beer from a particular brewery; in which case the misdescription was held to be fatal."

Equity, however, will endeavor to adjust the rights of the parties with reference to the materiality of the misdescription, and according to the circumstances of the case will refuse to compel the purchaser to conclude the sale, or will enforce the sale subject to compensation to be made by the vendor; but it will only Pollock on adopt this last course where the misdescription is no Contracts, pp. 472-476. more than a detail of the transaction, and does not affect the substance of the contract.

(c) Contracts for the purchase of shares in Companies. Com- Purchase of shares influenced by projector's statements.

The rules with respect to the candor and fullness of statement required of projectors of an undertaking in which they invite the public to join cannot be better stated than in the judgment of KINDERSLEY, V. C., in the case of the *New Brunswick and Canada Rail-* 1 Dr. & Sm. *way Company v. Muggeridge.* at p. 381.

"Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only *143 to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, extent or quality of the privileges and advantages which the prospectus holds out as inducement to take shares." These dicta are quoted with approval by

L. R. 2 H. L. Lord CHELMSFORD in *The Venezuela Railway Company v. Kisch.*
at p. 113.

In a later case Lord CAIRNS points out the distinction between Fraud and such non-fraudulent Misrepresentation as makes a contract of this nature voidable. He intimates that mere non-disclosure can never amount to fraud unless accompanied with such substantial representations as give a false air to facts, but

L. R. 6 H. L. that "it might be a ground in a proper proceeding and
403.
In *Peek v. Gurney.* at a proper time for *setting aside an allotment or purchase of shares.*"

Contract of suretyship is sometimes treated as being one of this particular class of contracts; but as *rimas fidei* in regards the formation of the contract it is safe to say its inception. that this is not so.

N. British Insurance Co. v. Lloyd,^{10 Ex. 523;} It has been explicitly laid down in more than one case that the rules applicable to marine insurance do not apply to the contract entered into between the creditor and the surety of the debtor. Non-disclosure or misrepresentation by the former must amount to fraud in order to invalidate the contract, though it would appear from the decision in *Lee v. Jones* that in contracts of this nature very slight evidence is regarded as material upon which a jury may found an inference of fraud.

but becomes so when once made. But once the contract of suretyship has been entered into, the surety is entitled to be informed of any agreement which alters the relations of creditor and debtor, or any circumstance which might give him a right to

L. R. 7 Q. B. 666. [See *Evans v. Kneeland*, 9 Ala. 42.] avoid the contract. So in *Phillips v. Foxall*, the defendant had guaranteed the honesty of a servant in the

employ of the plaintiff; the servant was guilty *144 of dishonesty in the course of his service, but the plaintiff continued to employ him and did not inform the defendant of what had occurred. Subsequently the servant committed further acts of dis-

honesty, and the plaintiff came upon the defendant to make good the loss. It was held that as the defendant *Burgess v. Eve. L. R.* would have an equitable right to revoke a guarantee 18 Eq. 457. of this nature upon the first intelligence of the servant's dishonesty, the concealment from him of what had occurred released him from all liability for loss which had subsequently accrued.

Even in contracts of the nature just described there Expressions is a limit to the effect of statements made with refer- of opinion ence to the subject matter of the contract. A mere amount do not expression of opinion will not amount to a representa- representa- tion the falsehood of which invalidates the contract. Thus in a contract of marine insurance the insured communicated to the insurers a letter from the master of his vessel stating that in his opinion the anchorage of the place to which the vessel was bound was safe and good. The vessel was lost there: but the Court held that the insured, in reading the master's letter to [Tuck v. the insurers, communicated to them all that he him- Downing, 76 self knew of the voyage, and that the expressions con- Ill. 71.] tained in the letter were not a representation of fact, *Anderson v. Pacific In- surance Co.,* but an opinion which the insurers could act upon or L. R. 7 C.P. 65. not as they pleased.

In like manner commendatory expressions, such as Nor do commen habitually use in order to induce others to enter mendantary expressions. into a bargain, are not dealt with as serious representations of fact. A certain latitude is allowed to a man who wants to gain a purchaser. Thus at a sale by auction a statement that land was "very fertile and improvable," whereas in fact it was in part abandoned *Dimmock v. Hallett, L. R. 2 Ch. at* as useless, was held not to amount to a representation or misdescription such as would invalidate a sale of p. 27. [Tuck land, it was said to be "a mere flourishing description 76 Ill. 71.] by an auctioneer."

#145

§ 3. FRAUD.

Fraud.

In dealing with the subject of Fraud, we must endeavor to confine ourselves to a few very simple and general rules, lest we should be led into a discussion beyond the scope of this treatise, and perhaps of ethical rather than legal significance. It is idle to attempt to frame a definition of Fraud which should cover every aspect of so multiform a conception; nevertheless we may put together in a set of words what may be considered to be the essential characteristics of Fraud such as will give rise to the action of deceit.

Its essential features.

Fraud is a false representation of fact, made with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it.

Let us consider these characteristics in detail.

There must be a representation, false in itself, or combined with suppression of truth.**Fraud is a false representation.**

It differs in this respect from *non-disclosure* such as may vitiate a contract *uberrimæ fidei*; there must be some active attempt to deceive either by statement which is false, or by a representation, true so far as it goes, but accompanied with such a suppression of facts as make it convey a misleading impression. Concealment of this kind is sometimes called "active," "aggressive," or "industrious;" but perhaps the word itself, as opposed to non-disclosure, suggests the active element of deceit which constitutes fraudulent misrepresentation. And the distinction between the misrepresentation by non-disclosure, which has no legal consequences except in the case of contracts *uberrimæ fidei*, and the misrepresentation which would give rise

L. R. 6 H. L. to an action of deceit, is most clearly pointed out by at p. 403. Lord CAIRNS in the case of *Peek v. Gurney*. "Mere

non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time *for setting aside an allotment or purchase of shares*, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."

Disclosure then is not in the case of ordinary contracts incumbent on the parties. A vendor is under no liability to communicate the existence even of latent defects in his wares unless by act or implication he represents such defects not to exist. In the case of *Ward v. Hobbs*, the defendant sent to a public market pigs which were to his knowledge suffering from a contagious disease, and his sending them to the market was a breach of 32 & 33 Vict. c. 78, s. 57. The plaintiff bought the pigs, no representation being made as to their condition. The greater number died: other pigs belonging to the plaintiff were also infected, and so were the stubble fields in which they were turned out to run. It was urged that the exposure of the pigs in the market amounted to a representation, under the circumstances, that they were free of any contagious disease. COTTON, L. J., in his judgment said, "What is relied upon here as a representation is this: that the defendant, knowing the pigs had an infectious disease, sent them to market. Is that evidence on which a jury could find, properly, that the defendant represented that the pigs had not, to his knowledge, any infectious disease?" And the Court held, overruling the judgment of the Court of Queen's Bench, that it was not.

[But see *Jef-
fery v. Bige-
low*, 18
Wend. 518.]

So too in the case of *Keats v. Lord Cadogan*, where 10 C. B. 591.

[Foster v.
Peyser, 9
Cush. 242.]

the plaintiff sued for damages arising from the defendant's fraud in letting to the plaintiff a house¹ *147 which he knew to be required for immediate occupation, without disclosing that it was in a ruinous condition, it was held that no such action would lie.

"It is not pretended," said JERVIS, C. J., "that there was any warranty, expressed or implied, that the house was fit for immediate occupation; but, it is said, that, because the defendant knew that the plaintiff wanted it for immediate occupation, and knew that it was in an unfit and dangerous state, and did not disclose that fact to the plaintiff, an action of deceit will lie. The declaration does not allege that the defendant made any misrepresentation, or that he had reason to suppose that the plaintiff would not do, what any man in his senses would do, viz., make proper investigation, and satisfy himself as to the condition of the house before he entered upon the occupation of it. There is nothing amounting to deceit."

The representation must be a representation *of fact*.

nor ex-
pression of
opinion;

Harvey v.
Young, 1
Yelv. 21.

It is hardly necessary to repeat what was said on the subject of misrepresentation, that a mere expression of opinion, which turns out to be unfounded, will not invalidate a contract; but a good illustration of the contrast between opinion and representation may be found in the difference between the vendor of property saying that it is worth so much, and his saying that he gave so much for it. The first is an opinion which

¹ The house was leased for a term of years. The law is otherwise where a furnished house is hired for a short period, as for instance the London season. In such a case immediate occupation is of the essence of the contract, and if the house is uninhabitable the lessee is discharged, not only on the ground of fraud, but because "he is offered something substantially different from that which was contracted for."

the buyer may adopt if he will; the second is an assertion of fact which, if false to the knowledge of the seller, is also fraudulent.

Again, an expression of intention does not amount to a statement of fact, nor does a promise, and we must distinguish a representation that a thing is, from a promise that a thing shall be. Yet, though the intention expressed in a promise cannot usually be regarded as a statement of facts, we must note that there is a distinction between a promise which the promisor intends to perform, and one which the promisor intends to break. In the first case he represents truly enough his intention that something shall take place in the future; in the second case he misrepresents his existing intention; he not merely makes a promise which is ultimately broken, but when he makes it he represents his state of mind to be something other than it really is. And so it has been laid down that if a man buy goods, not intending to pay for them, he makes a fraudulent misrepresentation.

Again, it is said that misrepresentation of law does not give rise to the action of deceit, nor even make a contract voidable as against the person making the statement. There is little direct authority upon the subject, but it may be submitted that the distinction drawn in *Cooper v. Phibbs* as to the difference between ignorance of general rules of law and ignorance of the existence of a right would apply to the case of a fraudulent misrepresentation of law, and that if a man's rights were concealed or misstated knowingly, he might sue the person who made the statement for deceit. It seems clear, from a late strong expression of opinion in the Queen's Bench Division, that a fraudulent representation of the effect of a deed can be relied on as a defense in an action upon the deed. (a.)

(a) [The general rule in this country, as well as in England, is that ignorance or mistake of law, or misrepresentation of the

The representation must be made *with knowledge of its falsehood or in reckless disregard of its truth.*

There must
be knowl-
edge of
falsehood;
*Dickson v.
Reuter's Tel-
egraph Co.*
L. R. 3. C.
P. D. L.

or disregard
of truth.

Unless this is so, a representation which is false gives no right of action to the party injured by it. Thus where a Telegraph Company, by a mistake in the transmission of a message, caused the plaintiff to ship to

England large quantities of barley which were *149 not required, and which, owing to a fall in the market, resulted in a heavy loss, it was held that the representation, not being false to the knowledge of the Company, gave no right of action to the plaintiff. "The general rule of law," said BRAMWELL, L. J., "is clear that no action is maintainable for a mere statement, although untrue, and although acted upon to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it." And this rule is to be qualified, or rather supplemented by the words of Lord CAIRNS in the *Reese River Mining Company v. Smith*, "that if persons take upon themselves to make assertions as to which they are ignorant, whether they are true or

legal effect of a contract, will not be ground for the avoidance of the contract in the absence of fraud, or where a relation of confidence exists between the parties. See *Upton v. Tribelcock*, 91 U. S. 45; *Fish v. Clelland*, 83 Ill. 288; *Clem v. Newcastle R. R. Co.*, 9 Ind. 488; *Townsend v. Cowles*, 31 Ala. 428; *Stow v. Bennett*, 5 Hill, (N. Y.) 803; *Russell v. Branham*, 8 Blackf. (Ind.) 277; *People v. Supervisors, etc.*, 27 Cal. 655; *Bank of U. S. v. Daniel*, 12 Pet. (U. S. S. C.) 82; *Shotwell v. Murray*, 1 Johns. Chy. (N. Y.) 592; *Jones v. Watkins*, 1 Stew. (Ala.) 81; *Wheaton v. Wheaton*, 9 Conn 96; *Pinkham v. Greer*, 3 N. H. 163; *Hubbard v. Martin*, 8 Verg. (Penn.) 498; *Rufus v. McConnell*, 17 Ill. 212; *Christy v. Sullivan*, 50 Cal. 897. There are a few cases which recognize the distinction made in the text, of which the best considered seems to be *Underwood v. Brockman*, 4 Dana, (Ky.) 309. See, also, *Fitzgerald v. Peek*, 4 Litt. (Ky.) 125, and *Lownes v. Chisholm*, 2 McCord Chy. (S. Car.) 455. Ignorance of a foreign law is considered as ignorance of fact, and the laws of the various States are treated as foreign to the citizens of other States. *Haven v. Foster*, 9 Pick. (Mass.) 112.]

not, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." Therefore if a man makes a false representation in ignorance of its falsehood he is not liable as for fraud, unless in the case of such recklessness of statement as would suggest *mala fides*.

The enunciation of the law on the subject by BRAMWELL, L. J., is so clear and decisive that it is not necessary to go into a series of conflicting decisions between the years 1832 and 1844, in some of which it was laid down that a false statement made in good faith amounted to "fraud in law."¹ It is now settled *150 that a statement made with *bona fide* belief in its truth cannot be treated as fraudulent; but the reckless assertions spoken of by Lord CAIRNS are on the border line, which it is hard to draw accurately between truth and falsehood. There may well be occasions in the course of business when a man is tempted to assert

¹ The term "fraud in law," or legal as opposed to moral fraud, seems now to be finally condemned. It had a meaning so long as some Judges were disposed to hold, as Lord DENMAN held in *Evans v. Collins*, that the author of a misstatement which caused loss to the plaintiff, "though charged neither with fraud nor with negligence, must have been guilty of some fault when he made a false representation." But since that decision was reversed by the Court of Exchequer Chamber, on the express ground that a statement made honestly and in a full belief of its truth could not afford no cause of action, the term *legal fraud* has ceased to mean anything. Its final condemnation is to be found in the judgment of BRAMWELL, L. J., in the case of *Weir v. Bell*, in which, after saying that to make a man liable for fraud, moral fraud must be proved against him, he adds, "I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well founded complaint of legal fraud or of anything else except where some duty is shown, and correlative right and some violation of that duty and right, and when these exist, it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical, and unmeaning, with the consequent uncertainty."

for his own ends that which he wishes to be true, which he does not know to be false, but which he strongly suspects to have no foundation in fact. Such statements cannot be regarded as *bona fide*, and the maker of them must be held responsible if they turn out to be false.

Though the motive need not be fraudulent.

See *ante*, p. 130.

L. R. vi. H. L. 400.

But there is another aspect of fraud in which the fraudulent intent is absent but the statement made is known to be untrue. Such is the case of *Polhill v. Walter* cited above. And the decision in that case is practically confirmed by the judgment of Lord CAIRNS in the case of *Peek v. Gurney*. The plaintiff in that case had purchased shares from an original allottee on the faith of a prospectus issued by the directors of a Company, and he brought an action of deceit against the directors. Lord CAIRNS, in his judgment compared the statement in the prospectus with the facts of the condition of the Company at the time they were made, and came to the conclusion that the statements were not justified by the facts of the case. He then proceeded to point out that though these statements were false, yet the directors might well have thought, and probably did think, that the undertaking would be a profitable one. "But," he says, "in a civil proceeding of this kind all that your Lordships have to examine is the question, Was there or was there not misrepresentation in point of fact? And if there was, however innocent the motive may have been, your

*151 Lordships will be obliged to arrive at the consequences which would properly result from what was done." And the reason for such a rule of law is obvious: if a man chooses to assert what he knows or even suspects to be false, hoping or even believing that all will turn out well, he cannot be permitted to urge upon the injured party the excellence of the motives with which he did him a wrong, but must submit

to the natural inferences and results which follow upon his conduct. (a)

The representation must be made with the intention that it should *be acted upon by the injured party.*

We may divide this proposition into two parts. Firstly, the representation need not be made to the injured party; but, secondly, it must be made with the intention that he should act upon it.

In *Langridge v. Levy*, the defendant sold a gun to 2 M. & W. the father of the plaintiff for the use of himself and his sons, representing that the gun had been made by

^{519.}

The statement need
not be made
to the injured
party.

(a) [The weight of authority in courts of equity seems to be upon the side of permitting a party to rescind a contract which he was induced to enter into by reason of false representations of the opposite party, even if the falsehood was not known to the party making the representations, and some courts go so far as to hold that the good faith of the party who makes the false representations will be no defense, as the mere fact that a party made a contract under a mistake of fact, induced by the act or word of the other party, will be ground for the revocation of the contract, when the falsehood or mistake is discovered. See *Thompson v. Lee*, 31 Ala. 292; *Foards v. McComb*, 12 Bush. (Ky.) 723; *Elder v. Allison*, 45 Geo. 10; *Converse v. Blumrich*, 14 Mich. 109; *Bankhead v. Alloway*, 6 Cold. (Tenn.) 56; *Wilcox v. Iowa Wes. Univ.*, 32 Iowa, 367; *Twitchell v. Bridge*, 42 Vt. 68; *Trengel v. Miller*, 87 Ind. 1; *Allen v. Hart*, 72 Ill. 104. But, see *Tone v. Wilson*, 81 Ill. 529.

In a number of States it is held that to maintain an action on the case for deceit in making false representations, it is sufficient to prove that a party, with intent to deceive, made representations as true which he did not know to be true, and which were, in fact, false. See *Cabot v. Christie*, 42 Vt. 121; *Fisher v. Mullen*, 103 Mass. 503; *Litchfield v. Hutchinson*, 117 Mass. 195; *Marsh v. Parker*, 40 N. Y. 562; *Indianapolis R. R. Co. v. Tyng*, 63 N. Y. 653; *Bristol v. Braidwood*, 28 Mich. 191. But in other States it is held that the knowledge of the falsity of the representations must be alleged and proved. See *Wilcox v. Iowa Wes. Univ.*, 32 Iowa, 367; *Mervin v. Arbuckle*, 81 Ill. 501; *Terrell v. Bennett*, 18 Geo. 404; *Hopper v. Lisk*, 1 Ind. 176; *Holmes v. Clark*, 10 Iowa, 428; *Pettigrew v. Chellis*, 41 N. H. 95; *Morton v. Scull*, 23 Ark. 289.]

Nock, and was "a good, safe and secure gun;" the plaintiff used the gun; it exploded, and so injured his hand that amputation became necessary. He sued the defendant for the false representation, and the jury found that the gun was unsafe, was not made by Nock, and found generally for the plaintiff. It was urged, in arrest of judgment, that the defendant could not be liable to the plaintiff for a representation not made to him; but the Court of Exchequer held that, inasmuch as the gun was sold to the father to be used by his sons, and the false representation made in order to effect the sale, and as "there was fraud and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured."

But the limitation of this liability is marked by
2 J. & H. 1. Wood, V. C., in *Barry v. Croskey*. "Every man

but must be made with the intention that he should act upon it.

must be held liable for the consequence of a *152 false representation made by him to another upon which a third person acts, and so acting is injured or damaged, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss. But to bring it within the principle, the injury, I apprehend, must be the immediate and not the remote consequence of the

L. R. vi. H. L. 377. [See Wells v. Cook, 16 Ohio St. 67.] p. 410.

representation thus made." Therefore in *Peek v. Gurney*, a body of directors who would have been liable to original allottees of shares for false statements contained in the prospectus of the Company were held not to be liable to persons who subsequently purchased shares which came into the market, on the ground that their intention to deceive could not be supposed to extend beyond the first applicants for shares. So soon as these had been allotted, "the prospectus had done its work: it was exhausted."

The representation must actually deceive.

This would seem to be clear enough, and there is direct authority for the proposition. In *Horsfall v. Thomas*, the plaintiff sued the defendant upon a bill of exchange accepted by him in payment for a cannon which he had bought of the plaintiff. The cannon had a defect which made it worthless, and the plaintiff had endeavored to conceal this defect by the insertion of a metal plug into the weak spot in the gun. The defendant never inspected the gun; he accepted it and upon using it for the purpose for which he bought it the gun burst. It was held that the attempted fraud having had no operation upon the mind of the defendant did not exonerate him from paying for the gun. "If the plug, which it was said was put in to conceal the defect, had never been there, his position would have been the same; for, as he did not examine the gun or form any opinion as to whether it was sound, its condition did not affect him." This judgment has been severely criticised by high authority, but it is submitted that it is founded in reason. Deceit which does not affect conduct can hardly create liabilities; and it would seem reasonable to defend an action brought for the price of goods on the ground that the seller was a man of immoral character, as to maintain that a contract was voidable by reason of a deceit practised by one party which in no way affected the judgment of the other.

We are now in a position to consider what is the effect of Fraud, such as we have described it to be, upon rights *ex contractu*.

We may observe, in passing, that the person injured by Fraud such as we have described has the action at Common Law for deceit, and may recover by that

**Slim v.
Croucher, 1
D. F. & J. pp.
523, 524.**

means such damage as he has sustained; and there is authority for saying that Courts of Equity will similarly grant relief from misrepresentation or fraud by compelling the defendant to make good the loss sustained by the plaintiff. These remedies are not confined to cases of fraud by one of two contracting parties upon the other, but to any fraudulent statement which leads the person to whom it is made to alter his position for the worse.

But we are concerned with rights arising *ex contractu*, and have to consider the particular remedies in respect of affirmation or avoidance of the contract which are open to the injured person when he disovers the fraud; and the rules with regard to these matters may be shortly stated thus:

**Right to
affirm.**

17 Beav. 95.

(1) He may affirm the contract and ask to have the representations by which he was induced to enter into it made good so far as may be possible. The principles upon which his claim to the exercise of this equitable right depends are thus laid down in the case of *Pulford v. Richards*: "The distinction between the cases where the person deceived is at liberty to avoid the contract, of where the Court will affirm it, giving him compensation only, are not very clearly defined. The question usually rises on the specific performance of contract for the sale of property; and the principle which I apprehend governs the cases, although it is in practice of very difficult application, and leads to refined distinction, is the following, viz., that if the representation be one that can be made good, the party to the contract shall be compelled, or may be at liberty to do so; but if the representation made be one which cannot be made good, the person deceived shall be at liberty, if he please, to avoid the contract."

But if the contract be affirmed, the affirmation brings

with it all the liabilities of the contract, and the fraud can no longer be set up a ground of relief.

(2) He may avoid the contract, and so may

- (a) resist an action brought upon it at Common Law; Right to rescind.
- (b) resist specific performance when sought in Equity;
- (c) obtain a judicial avoidance of the contract in Equity.

(3) His right to avoid the contract is limited in certain ways. It is true that a man may keep the contract open until he is sued upon it, and that a plea of fraud then set up is a sufficient rescission of the contract; but so long as he keeps it open he does so at his own risk. His right to avoid it may be determined either by his accepting some benefit under the contract, or otherwise acting upon it after he has become aware of the fraud; or by the subject-matter of the contract being so dealt with that the parties cannot be reinstated in their former position; or by innocent third parties acquiring an interest for value under the contract.

A lapse of time, although it does not otherwise affect his right to rescind, is evidence to show that he intended to affirm, increasing in strength as the rescission is delayed.

It must be borne in mind that the contract, until the defrauded party has made his election, is voidable, and not void. It is therefore possible for innocent third parties to acquire rights under it of which they cannot be deprived by a subsequent avoidance on the part of the person defrauded. A sale of goods procured by fraud cannot be rescinded so as to revest the property in the vendor if in the meantime the goods have been sold to a *bona fide* purchaser. If, for the reasons

described, the person upon whom the fraud has been practiced has lost his right of avoidance, he must then be left to his action *ex delicto*.

An exception to this rule occurs when the fraud goes not to the quality of goods, or circumstances of the sale but to the identity of the person contracted with.

See ante, p. 119. The case *Cundy v. Lindsay*, cited above, shows that where A is induced to send goods to B under the impression that he is contracting with X the transaction is absolutely void, and a *bona fide* purchaser from B acquires no property in the goods.

§ 4. DURESS.

A contract is voidable at the option of one of the parties if he have entered into it under Duress.

In what it consists. Duress consists in actual or threatened violence or imprisonment; the subject of it must be the contracting party himself, or his wife, parent or child; and it must be inflicted or threatened by the other party to 1 Rolle, Abr. the contract, or else by one acting with his knowledge 688. and for his advantage.

Must affect promisor. A contract entered into in order to relieve a third person from duress is not voidable on that ground; *Huscombe v. Standing,* though a simple contract, the consideration for Cro. Jac. 187. *156 which was the discharge of a third party by the See ante, p. 76. promisee from an illegal imprisonment, would be void for unreality of consideration.

Atlee v. Back. Nor is a promise voidable for duress which is made house, 3 M. & W. 683. in consideration of the release of goods from detention and must be personal. If the detention is obviously wrongful the promise would be void for want of consideration; if the [See Spuids v. Barrett, 57 legality of the detention was doubtful the promise Ill. 289.] might be supported as a compromise. But money paid for the release of goods from wrongful detention

See App. A. may be recovered back in virtue of the quasi-contractual relation created by the receipt of money by one person which rightfully belongs to another.

§ 5. UNDUE INFLUENCE.

We have described the kind of Fraud which gives Undue influence to the action of deceit, and the effect of Fraud of ^{ence.} that description upon the validity of a contract. But it may well be that persons may be induced to enter into contracts not by any specific statement of a fraudulent character, but by reason of circumstances placing it in the power of others to engage them in disadvantageous bargains or promises.

Courts of Equity have always gone further than arises from a Courts of Law in the interpretation which they have given to the term Fraud. Looking beyond definite false and fraudulent statements, they have inferred from a long course of conduct, from the peculiar relations of the parties, or from the circumstances of one of them, that an unfair advantage has been taken of the promisor, and that his promise ought not in equity to bind him. The taking of such an unfair advantage is sometime called Fraud; but it is more convenient, for the purpose of distinguishing it from the kind of Fraud with which we have already dealt, to call it the exercise of "Undue Influence."

The subject is one which can only be dealt with *157 in the most general way; it depends upon the view taken by a Court of Equity of the general tendency of transactions, often extending over some time, and consisting of many details, whether or no relief is granted. It is significant of the nicety of the questions of fact involved in cases of this description, that in a recent judgment of the House of Lords on appeal from the O'Rorke v. Irish Court of Chancery, Lord HATHERLEY differed from Lords BLACKBURN and GORDON as to the propriety of granting relief, and the whole Court differed from Lord Justice CHRISTIAN as to the moral character of the acts complained of.

Definition
of undue
influence.

L. R. 8 Ch.
490.

It is well to try to obtain some sort of definition of Undue Influence before endeavoring to classify the sets of circumstances which have been held to suggest its existence. The best is to be found in the judgment of Lord SELBORNE in *The Earl of Aylesford v. Morris*. In speaking of the sort of cases, "which, according to the language of Lord HARDWICKE, raise from the circumstances and conditions of the parties contracting a presumption of fraud," he says, "Fraud does not here mean deceit or circumvention; it means an unconscious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just and reasonable."

In attempting to ascertain the principles upon which this presumption is raised, we may note at starting:

Kekewich v. Manning,¹ (a) that equity will not enforce a gratuitous promise even though it be under seal;

Houghton v. Houghton,² 15 *158 (b) that the acceptance of a voluntary donation throws upon the person who accepts it the necessity of proving "that the transaction is righteous;"

Wood v. Abrey,³ Maddock, 423. (c) that inadequacy of consideration is regarded as an element in raising the presumption of Undue Influence or Fraud;

Coles v. Trecothick,⁴ 9 Ves. 246. (d) but that mere inadequacy of consideration will not (according to the strong tendency of judicial opinion,) amount to proof of either.

We may therefore frame the question which we have to discuss somewhat in this way: When a man appears in a Court of Equity, either as plaintiff or defendant, seeking to escape the effects of a grant which he has made gratuitously or a promise which he has given

"*upon* a very inadequate consideration, what must he *show* in addition to this in order to raise the presumption that Undue Influence has been at work?

One class of circumstances calculated to raise this presumption appears to be that the party benefited stood in some such relation to him as to render him peculiarly subject to influence. Parental or quasi-parental relations subsisting between promisor and promisee will raise this presumption. In *Archer v. Hudson*, a young lady who had just attained her majority became security for her uncle who was desirous of overdrawing his account at his banker's. The Master of the Rolls adverting to the fact that the security was obtained through the influence of a person standing *in loco parentis* from the object of his protection and care, said, "This is a transaction which under ordinary circumstances this Court will not allow.....

This Court does not interfere to prevent an act even of bounty between parent and child, but it will take notice under the circumstances in which the parent and child are placed before the emancipation of the child,) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control."

And one may extend the term "parental relations" to all cases in which one member of a family exercises a substantial preponderance in the family councils either from age or from character or from circumstances.

The power which a spiritual adviser may acquire over persons subject to his influence is also looked upon as raising the presumption of *mala fides*; and to this may be added a number of relations which it is somewhat hard to define, but which may generally be termed "confidential." Solicitor or advocate and client, guardian and ward, doctor and patient, trustee and *cestui que trust*, are some of these.

Or influence, however acquired, may raise presumption of unfair dealing.

Pollock on Contracts, 2nd ed. 534-539.

7 H. L. C.
550.

But the Courts have shown themselves unwilling to limit or define the relations which they will regard as raising the presumption of influence, being more inclined to reserve to themselves the power of enquiring whether influence was in fact exercised, than to reject the possibility of such exercise because the parties did not stand in certain special relations. The principle applies to every case where "influence is acquired and abused, where confidence is reposed and betrayed."

In *Smith v. Kay* the defendant, who had barely attained his majority, had incurred liabilities to the plaintiff by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation. It was held that influence of this nature, though it certainly could not be called parental, spiritual, or fiduciary, entitled the plaintiff to the protection of the Court.

"It is not," said Lord KINGSDOWN, "the relation of solicitor and client, or trustee and *cestui que trust*, which constitutes the sole title to relief in these cases, and which imposes upon those who obtain such securities as these the duty, before they obtain their confirmation, of making a free disclosure of every circumstance which it is important that the individual

who is called upon for the confirmation, should *160 be apprised of. The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed. The relations with which the Court of Chancery most ordinarily deals are those of trustee and *cestui que trust*, and such like. It applies specially to those cases, for this reason, and for this reason only, that from those relations the Court presumes confidence put and influence exerted. Whereas in all other cases where those relations do not subsist, the confidence and the influence must be proved extrinsically; but where they are

proved extrinsically, the rules of reason and common sense and the technical rules of a Court of Equity are just as applicable in the one case as the other."

7 H. L. C.
779.

The doctrine has been extended to a class of cases from which the element of personal influence is altogether absent. It remains to consider the characteristics of these cases

They all appear to possess these common features: as in catching bargining bargains, the promisor encumbers himself with heavy liabilities for the sake of a small, or, at any rate, an inadequate present gain; and the promisee takes advantage either of the improvidence and moral weakness, or else of the ignorance and unprotected situation, of the promisor.

In former times the law attempted to guard in two ways against advantage being taken of persons in such a situation. Usury Laws provided that a promise to pay interest beyond a certain rate per cent. should be void, and thus prevented extortionate loans of money. And the Court of Chancery adopted a rule that the purchaser of any reversionary interest might always be called upon to show that he had given full value for his bargain, so that he might not take advantage of a man's present necessities to deprive him of his future estates without reasonable return.

The Usury Laws are repealed, and the 31 Vict. c. 4 abrogates the rule of law as to reversionary interests in all cases of purchases made *bona fide* and without fraud or unfair dealing. But if a man takes advantage of the present poverty of an expectant heir to extort from him an exorbitant and ruinous rate of interest, he is liable to have the bargain set aside, and to be remitted to his claim for so much money as he has actually advanced, with the legal rate of interest upon it.

And, on similar grounds, a man who bargains on terms of inequality as to age or knowledge with the

person in
present dis-
tress,

or ignorant
and ill-
advised.

Per Lord
Hatherley in
*O'Rorke v.
Bolingbroke*, contract."

L. R. 2 App.
Ca. at p. 823.
[Seldon v.
Myers, 20
How. 500.]
*Beynon v.
Cook*, L. R.
10 Ch. 889.

The Court will look not merely to the acts of the parties, but to the reasonableness of the transaction under all the circumstances of the case; and if it appear that one has taken advantage of the unprotected condition of the other to drive a hard bargain, the transaction will not be allowed to stand.

Limits of
right to
rescind.

The rules respecting the right to rescind contracts entered into under Undue Influence follow, so far as equity is concerned, the rules which apply to Fraud, but with one noticeable qualification. In the case of Fraud, so soon as the Fraud is discovered the parties are placed on equal terms, and an affirmation of the contract binds the party who was originally defrauded. But in the case of Undue Influence it is not a particular statement, but a combination of circumstances which constitutes the vitiating element in the contract;

and unless it is clear that the will of the injured

*Moxon v.
Payne*, L. R.
8 Ch. 881.

*162 party is relieved from the dominant influence under which it has acted, or that the imperfect knowledge with which he entered into the contract is supplemented by the fullest assistance and information, an affirmation will not be allowed to bind him.

CHAPTER V.***163****LEGALITY OF OBJECT.**

THERE is one more element in the formation of contract which remains to be considered — the object of the parties. Certain limitations are imposed by law upon the freedom of contract. Certain objects of contract are forbidden or discouraged by law; and though all other requisites for the formation of a contract be complied with, yet if these objects are in contemplation of the parties when they enter into their agreement, the law will not enforce it.

Two matters of inquiry present themselves in respect of this subject. The first is the nature and classification of the objects regarded by law as illegal. The second is the effect of the presence of such objects upon the contracts in which they appear.

§ 1. NATURE OF ILLEGALITY IN CONTRACT.

The modes in which the law expresses its disapproval of certain objects of contract may roughly be described as follows:

- (i) Prohibition by Statute.
- (ii) Prohibition by express rules of Common Law.
- (iii) Prohibition through the interpretation by the Courts of what is called "the policy of the law."

So that illegal agreements may be (1) agreements in breach of Statute, (2) agreements in breach of express rules of Common Law, (3) agreements contrary to public policy.

*164 These last two are not always very easy to distinguish, for frequent decisions upon certain matters upon public policy have caused tolerably definite and express rules regarding them to grow up; and these are in effect rules of Common Law as express, or nearly so, as those with which we shall deal under class 2.

(i) *Contracts which are made in breach of Statute.*

Illegality from statutory prohibition.

A statute may render an agreement illegal in one of two ways—by express prohibition, or by penalty. It may say, in so many words, that contracts of a certain sort are illegal, or void, or both; and where it thus expressly avoids a contract or makes it illegal, no doubt can arise as to the intention of the Legislature.

Illegality from imposition of a penalty, how ascertained.

But where the statute does no more than impose a penalty upon the carrying out of the objects of a contract, a question may arise whether or no the penalty amounts to a prohibition. Two marks may assist us to determine the intention of the Legislature. The first of these is the object of the penalty. If it be “a protection to the public as well as the revenue,” if it be designed to further objects of public policy in relation to some trade or business, then a penalty amounts, without doubt, to a prohibition. If it be solely to

Brown v. Duncan, 10 B. & C. 43.

facilitate and secure the collection of the revenue, then it is possible that the contract, though penalized, is not prohibited. The soundness of this distinction has

Per Parke, B., in Cope v. Rowlands, 2 M. & W. 149.

however been called in question, and a more important mark is to be found in the continuity of the penalty.

Where a statute forbids the carrying on of a trade except under certain conditions, on pain of incurring a specified penalty once for all, it has been held that contracts made in breach of such provisions are not vitiated. But where the penalty is recurrent upon [See Pang-born v. West every breach of the provisions of the statute, then lake, 36 Iowa, 546.] there can be no doubt that the objects of the contract

Is it continuous?

Smith v. Mawhood, 14 M. & W. 463.

[See Pang-

born v. West]

every breach of the provisions of the statute, then

lake, 36

Iowa, 546.]

are intended to be regarded as illegal, and the *165 contract itself void.

The law upon this point may then be conveniently summarized thus. Where a penalty is inflicted by statute upon the carrying on of a trade or business in a particular manner, we may assume *prima facie* that contracts made in breach of such statutory provisions are illegal and void. But if it appear that the penalty is imposed, not for the benefit of the public in general, but for the security of the revenue, it is *possible* that the contract was only intended to be penalized and not prohibited. And if, in addition to this, it appear that the penalty is imposed once for all upon the offending trader, and not upon each successive contract continuously, it is highly *probable*, if not certain, that contracts so made are not intended to be vitiated.

It is not necessary or desirable to discuss here in Objects of any detail the various statutes by which certain contracts are prohibited or penalized. They relate (1) to the security of the revenue; (2) to the protection of the public in dealing with certain articles of commerce, (3) or in dealing with certain classes of traders; (4) to the regulation of the conduct of certain kinds of business. An excellent summary of statutes of this nature is to be found in the work of Mr. Pollock, and Pollock, it is not proposed to deal further with them here. pp. 342-345.

There is however one class of contracts which, from its peculiar character, and from the various forms in which it has been dealt with by the Legislature, it is worth while to examine more particularly. These contracts are Wagering Contracts. The subject has been Wagering somewhat confused by the use of the word wager as a term of reproach, so that some contracts not permitted by law have been called wagers, as opposed to others which, while precisely similar in their nature, comply with certain special conditions and so enable Courts of Law to enforce them.

What is a wager?

*166 A wager is a promise to pay money, or transfer property upon the determination or ascertainment of an uncertain event; the consideration for such a promise is either a present payment or transfer by the other party, or a promise to pay or transfer upon the event determining in a particular way.

The event may be uncertain because it has not happened, or it may be uncertain because it is not ascertained, at any rate to the knowledge of the parties. Thus a wager may be made upon the length of St. Paul's, or upon the result of an election which has already happened, though the parties do not know in whose favor it has gone. The uncertainty then resides in the minds of the parties, and the subject of the wager may be said to be rather the accuracy of each man's judgment than the determination of a particular event.

It is obvious that a wager may be a purely gambling or sporting transaction, or it may be directed to commercial objects. A man who bets against his horse winning the Derby is precisely in the same position as a man who bets against the safety of his own cargo. Yet we should not hesitate to call the one a wager, while the other is called a contract of marine insurance. A has a horse likely to win the Derby, and therefore a prospect of a large return for money laid out in rearing and training the horse, in stakes and in bets; he wishes to secure that he shall in no event be a loser, and he agrees with X that, in consideration of X promising him £4,000 if his horse loses, he promises X £7,000 if his horse wins.

The same is his position as owner of a cargo; here too he has a prospect of large profits on money expended upon a cargo of silk, here too he wishes in no event to be a loser, and he agrees with X, an underwriter, that in consideration of his paying X £—, X promises to pay him £— if his cargo is lost by certain specified perils.

Marine insurance is a wager,

The law forbids A to make such a contract unless he has what is called "an insurable interest" in the cargo, and contracts in breach of this rule have been called mere wagers, while those which conform to it have been called contracts of indemnity. But such a distinction is misleading. It is not that one is and the other is not a wager: a bet is not the less a bet because it is a hedging bet; it is the fact that one wagering contract *is* and the other *is not permitted by law* which makes the distinction between the two. Apart from this there is no real difference in the nature of the contracts.

A life insurance is in like manner a wager. Let us compare it with an undoubted wager of a similar kind.

A is about to commence his innings in a cricket match, and he agrees with X that if X will promise to give him £1 at the end of his innings, he will pay X a shilling for every run he gets. A may be said to insure his innings as a man insures his life; for the ordinary contract of life insurance consists in this, that A agrees with X that if X will promise to pay a fixed sum on the happening of an event which must happen sooner or later, A will pay to X so much for every year that elapses until the event happens. In each of these cases A sooner or later becomes entitled to a sum larger than any of the individual sums which he agrees to pay. On the other hand, he may have paid so many of these sums before the event takes place that he is ultimately a loser by the transaction. (a)

Let us now turn to the history of the law respecting wagering contracts.

(a) [In this country a person must have an insurable interest in the property insured or the policy will be invalid. *Busch v. Ins. Co.*, 28 Ind. 64; *Sawyer v. Mayhew*, 51 Me 898; *Fowler v. New York Ins. Co.*, 26 N. Y. 422; *Sweeney v. Franklin Ins. Co.*, 20 Pa. Stat. 337. And in life insurance the insurer must have interest in the life of the life assured. *Bevin v. Conn. Mut. Ins. Co.*, 28 Conn. 241.]

**Jackson v.
Colegrave
(1694), Car-
thew, p. 338.**

At Common Law wagers are enforceable, and, until the latter part of the last century, were only discouraged by the Courts by the imposition of some trifling difficulties of pleading. Gradually however the Courts, finding that frivolous and sometimes indecent matters

were brought before them for decision, established the rule that a wager was not enforceable if it led to indecent evidence, or was calculated to injure or pain a third person; and in some cases general notions of public policy were introduced to the effect that any wager which tempted a man to offend against the law was illegal. Strange, and sometimes ludicrous, results followed from these efforts of the Courts to discourage the litigation of wagers. A bet upon the duration of the life of Napoleon was held to be unenforceable, as tending, on the one side, to weaken the patriotism of an Englishman, on the other, to encourage the idea of the assassination of a foreign ruler, and so to provoke retaliation upon the person of our own sovereign. But it is evident that the substantial motive which pressed upon the judges was

"the inconvenience of countenancing idle wagers in courts of justice," the feeling that "it would be a good rule to postpone the trial of every action upon idle wagers until the Court had nothing else to attend to." (a)

**Per Bayley,
J., in Gilbert
v. Sykes.**

*172 A policy of life insurance differs in an important respect from a policy of marine or fire insurance. "Policies of insurance against fire or marine risks are contracts to recoup the loss which parties may sustain from particular causes. When such a loss is made good *aliunde*, the companies are not liable for a loss which has not occurred; but in a life policy there is no such provision. *The policy never refers to the reason for effecting it.* It is simply a

(a) [The general tendency of the statutes of the various States is to make all wagers void.]

contract that in consideration of a certain annual payment, the company will pay at a future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid, in order to purchase the postponed payment."

Per Wood,
V. C., Law v.
London In-
disputable
Life Policy
Co., 1 K. &
J. 220.

Thus, though in a life policy the insured is required to have an interest at starting, that interest is nothing as between him and the company who are the insurers. "The policy never refers to the reason for effecting it." The insurer promises to pay a large sum on the happening of a given event, in consideration of the insured paying lesser sums at stated intervals until the happening of the event. Each takes his risk of ultimate loss, and the statutory requirement of interest in the insured has nothing to do with the contract. And so if a creditor effects an insurance on his debtor's life, and afterwards gets his debt paid, yet still continues to pay the insurance premiums, the fact that the debt has been paid is no answer to the claim which he may make against the company. This rule has been established in *Dalby v. The London Life Assurance Company*, 15 C. B. 805, overruling *Godsall v. Baldero*, in which Lord ELLENBOROUGH had held that a contract of life insurance, like one of marine or fire insurance, was a contract of indemnity, and that it could not be enforced if the loss insured against had not in fact occurred.

(ii) *Contracts which are made in breach of definite rules of Common Law.* *173

It is hardly necessary to state that an agreement to commit a crime or indictable offense would be made to commit a crime; on an illegal consideration: but it is difficult to find an instance which is not at the same time a breach of some statutory prohibition.

Again, a contract with an alien enemy is illegal to trade with alien enemies; subject, to be void, not on any ground of public policy

Potts v. Bell, but because "it was a principle of the Common Law 8 T. R. 548. that trading with an enemy without the king's license [Griswold v. Waddington, was illegal in British subjects."

[15 Johns. 57.] The commonest form of contracts in breach of rules to commit a civil wrong. Thus in *Allen v. Rescous* an agreement in 2 Lev. 174. [See *Davis v. Arledge*, 3 Hill, (S. C.) 170.] which one of the parties undertook to beat a man was held void. An agreement which involves the publication of a libel is in like manner void. Agreements to *Clay v. Yates*, commit fraud upon a third party have not unfrequently come before the Courts. Thus in the case of *Mallalieu v. Hodgson*, a debtor making a composition with [Lawrence v. Clark, 36 N. Y. 128.] his creditors of 6s. 8d. in the pound, entered into a separate contract with the plaintiff to pay him a part of his debt in full. This was held to be a fraud on the other creditors, each of whom had promised to forego a portion of his debt in consideration of the others foregoing theirs in a like proportion. "Where a creditor in fraud of the agreement to accept the composition stipulates for a preference to himself, his stipulation is altogether void."

Thus too where the plaintiff purchased from the defendants an exclusive right to use a particular scientific process, and it turned out that they had no such exclusive right as they professed to sell, it was held that the plaintiff could not recover, because upon his

own showing, it appeared that he had purchased *174 this right in order to float a company from which he expected to make a profit by defrauding the shareholders. (a)

Begbie v. Phosphate Sewage Co., L. R. 10 Q. B. 499.

Fraud and illegality.

It is worth noticing here a difficulty sometimes introduced into this part of the law of contract arising from a confusion of illegality and fraud. Fraud is a civil wrong, and an agreement to commit a fraud is an

(a) [Plaintiff had knowledge of the worthlessness of the patent and having paid his money to get it to use for a fraudulent purpose it was held he could not recover it back.]

agreement to do an illegal act. But fraud as a civil wrong must be kept apart from fraud as a vitiating element in contract. Fraud may vitiate a contract for a reason other than the fact that it constitutes a civil wrong: as between the parties to a contract the fraud of one prevents the consent of the other from being genuine. If the fraud is discovered and the discovery acted upon in time, the contract can be avoided, not because the fraud is an illegality, but because the consent of the defrauded party was unreal: if the contract has been executed, the defrauded party must rely upon his remedy in *tort* and can sue for damages for the wrong he has sustained. But as between the parties to a contract, while still executory, the fraud of one affects it because the consent of the other is not genuine. We may say then that if A is induced to enter into a contract with X by the fraud of X the contract is *voidable*, because A's consent is not genuine. If A and X make a contract the object of which is to defraud M the contract is *void*, because A and X have agreed to do what is illegal. The subject would be much obscured if we allowed ourselves to confuse As in Smith on Contracts, Lect. vi. reality of consent with legality of object.

(iii) *Contracts which are made in breach of the policy of the law.*

The policy of the law, or public policy, is a phrase of frequent occurrence and somewhat attractive sound, but it is very easily capable of introducing an unsatisfactory vagueness into the law. It would be difficult to find its earliest application; most likely agreements which tended to promote litigation, or to restrain trade or marriage were the first to elicit the principle that the Courts would look to the interests of the public in giving efficacy to contracts. Wagers, while they continued to be legal, were doubtless a frequent provocative of judicial ingenuity on

this point, as is sufficiently shown by the case of *Gilbert v. Sykes* quoted above: but it cannot be said with confidence that the doctrine of public policy originated in the endeavor to elude their binding force. Whatever may have been the origin of the doctrine, it was applied very frequently, and not always with the happiest results, during the latter part of the last and the commencement of the present century. Modern decisions, however, while maintaining the duty of the Courts to consider the public advantage, have tended to limit the sphere within which this duty has been exercised, and the modern view of the subject is perhaps best expressed by JESSEL, M. R.: "You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract."

Egerton v.
Earl Brown-
low, 4 H.
L. C. 1.

Printing Co.
v. Sampson,
L. R. 19
Eq. 462.

There are some subjects, however, which have fallen under tolerably definite rules making agreements of certain kinds illegal, not as breaking express rules, but as infringing established principles or tendencies of the law. We will endeavor to arrange them under a few convenient heads.

Agreements tending to injure the public service.

Sale of
offices. [Car-
digan v.
Page, 6 N.
H. 188.]

2 B. & C. 661.

The public has an interest in the proper performance of their duty by public servants, and Courts of Law hold contracts to be illegal which have for their object the sale of public offices or the assignment of the salaries of such offices. This principle was carried so far that in *Card v. Hope* a deed was held to be void by which the owners of the majority of shares in a ship sold a portion of them, a part of the consideration for the sale being a covenant that the purchaser should have the command of the ship at sea, and that in the event of his death the sellers would appoint on the nomination of his executors. The judgment proceeded not merely on the ground that the ship was in the service of the East India

Company, which had been held equivalent to being in Blackford v. the public service, but on the ground that the public ^{Preston, 8 T. R. 89.} had a right to the exercise by the owners of *any* ship of their best judgment in selecting officers for it.

This is perhaps an extreme case. But there can be no doubt that the sale of public offices is contrary to the rules of Common Law, as it is also subject to statutory prohibition on the ground that the public has a right to some better test of the capacity of its servants than the fact that they possess the means of purchasing their offices. (a)

On a somewhat different principle the same rule applies to the assignment of salaries or pensions. "It is fit," said Lord ABINGER, in *Foster v. Wells*, "that M. & W. the public servants should retain the means of a decent subsistence and not be exposed to the temptations of poverty." And in the same case, PARKE, B., lays down the limits within which a pension is assignable. "When a pension is granted, not exclusively for past services, but as a consideration for some continuing duty or service, then, although the amount of it may be influenced by the length of service which the party has already performed, it is against the policy of the law that it should be assignable."

Agreements which tend to pervert the course of justice.

These most commonly appear in the form of agreements to stifle prosecutions, and we can hardly do

(a) [It is also held that an agreement to pay a public officer for his influence in securing a government contract is illegal. *Tool Co. v. Norris*, 2 Wall. (U. S. S. C.) 45. And the same principle is applied to an agreement by an employer to induce his employee to enter into a contract in favor of the promisor. *Harrington v. Victoria Graining Dock Co.*, L. R. 3, Q. B. D. 549.

It has also been held when a sheriff had agreed to appoint a person his deputy, and the person had sold his farm and put himself to great expense on the faith of the agreement, that it could not be enforced. *Hager v. Cuttin*, Sup. Ct. New York, 1 Weekly Jurist, 607.]

Williams v. Bayley, L. R. 1 H. L. 220. better than adopt Lord WESTBURY's statement of the law in one of the latest cases on the subject. "You shall not make a trade of a felony. If you are aware [Chandler v. Johnson, 39 Ga. 89.] that a crime has been committed you shall not convert that crime into a source of profit or benefit to yourself except where self." But the rule thus laid down must be taken subject to this qualification, that where civil and criminal remedies co-exist, a compromise of a prosecution is admissible. "We shall probably be safe in laying it down that the law will permit a compromise of all offenses though made the subject of a criminal prosecution, for which offenses the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offense is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it."

Per Lord Denman, C. J., Keir v. Leeman, 6 Q. B. 331, and see 9 Q. B. 395.

Reference to arbitration.

Scott v. Avery, 5 H. L. C. 811.

Edwards v. Aberayron Insurance Society, 1 Q. B. D. 596. [Gray v. Wilson, 4 Watts, 89.]

Again, agreements to refer matters in dispute to arbitration are regarded as attempts to "oust the jurisdiction of the Courts," and are not necessarily enforced. When a contract contains a condition which provides that disputes arising out of it shall be referred to arbitration, the validity of such a condition depends upon rather a fine distinction. Where the amount of damage sustained by a breach of the contract is to be ascertained by specified arbitration before any right of action arises, the condition is good; but where all matters in dispute, of whatever sort, are to be referred to arbitrators and to them alone, such a condition is illegal. The one imposes a condition precedent to a right of action accruing, the other endeavors to prevent any right of action accruing at all.

Contracts which tend to encourage litigation.

The rules respecting maintenance and champerty are really based upon this consideration of public policy. It is not thought well that one should buy an

interest in another's quarrel, or should incite to litigation by offers of assistance for which he expects to be paid.

Maintenance has been defined to be "when a man Com. Dig. maintains a suit or quarrel to the disturbance or ^{vol. v. p. 22.} hindrance of right."

Champerty is where "he who maintains another is to have by agreement part of the land, or debt, in suit." *178

Maintenance, as above described, hardly appears in the reports of recent times. The mere maintaining or assisting another person in a suit would not now avoid a contract entered into for such a purpose unless there were something vexatious in the maintenance.

"The law of maintenance," says Lord ABINGER in *Fin-* 11 M. & W. ^{#82. [Thall-} *don v. Parker*, "as I understand it upon the modern ^{him v.} constructions, is confined to cases where a man im- ^{Brinkerhoff,} properly and for the purpose of stirring up litigation ^{3 Cow. 647.]} and strife encourages others either to bring actions or to make defenses which they have no right to make."

But champerty, or the maintenance of a quarrel for a share of the proceed, has been repeatedly declared to avoid an agreement made in contemplation of it. Its most obvious form, a promise to supply evidence or conduct a suit in consideration of receiving a portion of the money or property be recovered, was held illegal in *Stanley v. Jones* and *Sprye v. Porter*. Its less ^{7 Bing. 369.} obvious form, a purchase, out and out, of a right to ^{7 E. & B. st.} sue has been placed on the footing of an assignment ^{[Hayney v.} of a chose in action, invalid at Common Law, but en- ^{Coyne, 10} forceable in Equity under certain circumstances. The ^{Reynolds. 73} enforceability of such an agreement would depend ^{Ill. 11; but} upon the purchase including any substantial interest see ^{Duke v.} ^{Harper, 2} beyond a mere right to litigate. If property is bought ^{Mo. App. 1.1} to which a right to sue attaches, that fact will not ^{Edmonds, 1} avoid the contract, but an agreement to purchase a ^{Y. & C. 499.} bare right would not be sustained.

Agreements which are contrary to good morals.

The only aspect of immorality with which Courts of law have dealt is sexual immorality; and the law upon this point may be shortly stated.

Ayerst v. Jenkins, 16 Eq. 275. A promise made in consideration of future illicit cohabitation is given upon an immoral consideration, and [Walker v. Gregory, 30 Ala. 180.] is void whether made by parol or under seal.

Gray v. Mathias, 5 Ves. 286. *179 A promise made in consideration of past illicit cohabitation is not taken to be made on an illegal consideration, but is a mere gratuitous Beaumont v. promise, binding if made under seal, void if made by Reeve, 8 Q. B. 483. parol.

Pearce v. Brooks, L. R. 1 Exch. 213. And an agreement innocent in itself will be vitiated if intended to further an immoral purpose and known [See Commonwealth v. Harrington, 3 Pick. 29.] by both parties to be so intended.

Agreements which affect the freedom or security of marriage.

Restraint of marriage, Such agreements, in so far as they restrain the freedom of marriage, are discouraged on political grounds as injurious to the increase of the population and the moral welfare of the citizen. So a promise under seal to marry no one but the promisee on penalty of paying her £1,000 was held void, as there was no promise of marriage on either side and the agreement was purely restrictive. So too a wager in which one man bet another that he would not marry within a certain time was held to be void, as giving to one of the parties a pecuniary interest in his celibacy.

Lowe v. Pears, 4 Burr. 2225. What are called marriage brocage contracts, or promises made upon consideration of the procuring or bringing about a marriage, are held illegal on various social grounds.

Hartley v. Rice, 10 East, 22. Agreements providing for separation of husband and wife are valid if made in prospect of an immediate separation. But if such agreements provide for a pos-

or of freedom of choice.

Arundel v. Trevillian, Rep. in Ch. 47. [Crawford v. Russell, 62 Barb. 92.]

Agreements for separation.

sible separation in the future they are illegal, whether made before or after marriage, because they give inducements to the parties not to perform "duties in the fulfillment of which society has an interest." *Cartwright v. Cartwright, 3 D. M. & G. 982.*

Agreements in restraint of trade.

It is against the policy of the law that a man should deprive himself of the means of exercising his skill and earning his living. The trade of the country and the individual himself may alike be sufferers.

The law upon this subject would fill a considerable space, but it is enough for our present purposes to give the simplest and most general rules to which it can be reduced.

(1) Consideration is required to support a promise in restraint of trade, even though the promise be made under seal. *Mallan v. May.* Indeed it was one time thought that the Courts would inquire into the adequacy, as well as the existence of the consideration, but this has been settled not to be so since the case of *Hitchcock v. Coker* (1887). *[Pierce v. Fuller, 8 Mass. 223.]*

(2) The restraint may be unlimited as to time, but must not be unlimited as to space. A man may promise that he will never carry on a certain trade within ten miles of London and the promise would be good; but if he promised that he would not carry on the trade anywhere for five years it would not be upheld. *[Ward v. Byrne, 5 M. & W. 561. Lawrence v. Kiddler, 10 Barb. 653.]*

(3) The restriction as to space must be reasonable in the judgment of the Court. Beyond this no definite rule as to the extent of restriction permissible can be laid down. The cases since 1854 turning upon this point have been excellently summarized by Mr. Pollock. *Pollock, 315.*

§ 2. EFFECT OF ILLEGALITY UPON CONTRACTS IN WHICH IT EXISTS.

What is the effect of illegality.

We now come to the second branch of the subject of Illegality in Contract, its effect upon the validity of a contract. The effect of illegality upon the validity of contracts in which it appears must of necessity vary according to circumstances. It may affect the whole, or only a part of a contract, and the legal and illegal parts may or may not be capable of separation. The direct object of a contract may be the doing of an illegal act, or the direct object may be innocent though the contract is designed to further an illegal purpose. The parties may both be ignorant, or both be aware of the illegality which remotely or directly affects *181 the transaction, or one may be innocent of the objects intended by the other. Securities may be given for money due upon or money advanced for an illegal purpose, and the validity of such securities depends upon various considerations. The most that can be done here to elucidate a very complex and lengthy breach of the law is to lay down some rules which will answer roughly, but it is hoped not inaccurately, the questions thus suggested.

When the contract is divisible.

Legal parts of contract to be severed if possible from illegal.

Pigot's Case, Co. Rep. 11. 27.

(i) Where the contract consists of several parts, so that there are several promises based on several considerations, the fact that one or more of these considerations is illegal will not avoid all the promises if those which were made upon legal considerations are severable from the others. This is an old rule of law explicitly laid down in Coke's Reports, "That if some of the Covenants of an Indenture or of the conditions endorsed upon a bond are against law, and some good and lawful, that in this case the covenants or condi-

tions which are against law are void *ab initio*, and the others stand good."

The rule applies whether the illegality exist by Statute or at Common Law, though at one time the judges held differently, and fearing lest statutes might be eluded, laid it down that "the statute is like a tyrant, where he comes he makes all void, but the common law is like a nursing father, makes all void that part where the fault is and preserves the rest." This distinction has however been held in several modern cases to be without foundation.

The most frequent illustrations of the general proposition are to be found in cases where a corporation has entered into a contract some parts of which are *ultra vires*, and so, in a sense, unlawful. In such cases it has always been held that "where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them, whether the illegality be created by statute or common law, you may reject the bad part and retain the good."¹

*182 Per Willes, J., in *Picker-
ing v. Ilfracombe Rail-
way, L. R. 3 C. P. 250.* [See
Robinson v.
Green, 3 Met. 159.]

When the contract is indivisible.

(ii) Where there is one promise made upon several considerations, some of which are bad and some good, the promise is wholly void, for it is impossible to say whether the legal or illegal portion of the consideration most affected the mind of the promisor and induced his promise. An old case which may be quoted in its entirety will illustrate this proposition.

The grounds of action were stated to be, "That Featherstone v. Hutchinson, Cro. Eliz. 109.

¹ These cases may serve as an illustration of the proposition before us, but it must be borne in mind that Lord CAIRNS, in *The Ashbury Carriage Co. v. Riche*, has pointed out that contracts of this nature are invalidated not so much by the *illegality* of their object as by the *incapacity* of the corporation to bind itself by agreement for purposes beyond its statutory powers.

whereas the plaintiff had taken the body of one H in execution at the suit of J S by virtue of a warrant directed to him as special bailiff, the defendant in consideration, he would permit him to go at large, and of two shillings to the defendant paid, promised to pay the plaintiff all the money in which H was condemned: and upon *assumpsit* it was found for the plaintiff: and it was moved in arrest of judgment, that the consideration is not good, being contrary to the statutes of 23 H. 6, and that a promise and obligation was all one. And though it be joined with another consideration of two shillings, yet being void against the statute in part it is void in all."

Where the direct object is unlawful but the intention innocent.

Direct object
being illegal,
the contract
is void,

(iii) Where the direct object of the parties is to do an illegal act the contract is void. It does not matter whether or no they knew that their object was illegal, "ignorance of the law excuseth none."

unless illegal
intent be ab-
sent and the
contract can
be legally
performed.
L.R. 8 Q.B. 202
[Favor v.
Philbrick,
7 N. H. 826.]

But the knowledge of the parties may become important if the contract admits of being performed, and is in fact performed in a legal manner, though the performance unknown to the parties would have directly resulted in a breach of the law. In *Waugh v. Morris* the defendant chartered the plaintiff's ship to take a cargo of hay from Trouville to London. The cargo was to be taken from the ship alongside, and was intended to be landed at a wharf in Deptford Creek.

Under 82 &
83 Vict c. 70,
s. 78. Con-
tagious Dis-
eases (Ani-
mals) Act,
1869.

Unknown to the parties an Order in Council had forbidden the landing of French hay. The defendant, on learning this, took the cargo from alongside the ship without landing it, and exported it. The vessel was delayed beyond the lay-days and the plaintiff sued for the delay. The defendant set up the illegal intention as avoiding the contract, but without success. "We

agree, said BLACKBURN, J., in delivering the judgment of the Court, "that where a contract is to do a thing which cannot be performed without a violation of the law, it is void whether the parties knew the law or not. But we think that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and if this be so, the knowledge of what the law is becomes of great importance."

Where the direct object is innocent but the intention unlawful.

(iv) Where the object of a contract is innocent in Illegality of itself, but is designed to further an illegal purpose, the object avoids contract is void if both parties knew of the illegal purpose at the time the contract was entered into. an otherwise innocent contract.

There is nothing illegal in a loan of money or a supply of goods; but if these are known to be intended to further an illegal purpose, neither *184 the money lent nor the goods supplied can form the subject of an action. The whole transaction is void. The law upon this subject rests mainly upon three cases which will furnish convenient illustrations of the rule. The first of these is *Cannan v. Bryce* 3 B. & Ald. (1819), in which the assignees of a bankrupt sued for ^{179.} the proceeds of goods which they asserted to be a part of the bankrupt's property. The goods had been assigned by the bankrupt to the defendant in part satisfaction of a bond which was to secure to the defendant the payment of money lent by him to the bankrupt to meet losses arising from stock-jobbing transactions which were illegal under 7 Geo. II. c. 8. It was held that the lending of the money, the bond, and the assignments under the bond (which were made after bankruptcy,) were all alike void, and that the plaintiffs could recover the proceeds of the goods. There

was no doubt that the defendant knew the illegal object to which his money was to be applied; and ABBOTT, C. J., in giving judgment, said, "Then as the statute has absolutely prohibited the payment of money for compounding differences, it is impossible to say that the making such payment is not an unlawful act: if it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollect that *I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object.*"

M. & W. 435. The second case is *McKinnell v. Robinson* (1838). [White v. Bass, 8 Cuss. 448.] Here an action was brought to recover a sum of money lent, as the plaintiff knew, for the purpose of playing at "Hazard," a game which, apart from 9 Anne, c. 14, is prohibited by 12 Geo. II. c. 28. It was held that the plaintiff could not recover, on the principle "that the repayment of money lent for the express purpose of accomplishing an illegal object cannot be enforced."

L. R. 1 Exch. *185 The third case is *Pearce v. Brooks* (1866). 213.

p. 230.

The action was brought by coach builders to recover payment for the hire of a brougham engaged by a prostitute. Evidence was given that the plaintiffs knew the character of the defendant, and from this, and from the nature of the article supplied, the jury found that the plaintiffs knew that it was supplied for the furtherance of an immoral purpose. Upon this it was held that the plaintiffs could not recover. "My difficulty was," said BEAMWELL, B., "whether, though the defendant hired the brougham for that purpose, it could be said that the plaintiffs let it for the same purpose. In one sense it was not for the same purpose. If a man were to ask for duelling pistols, and to say, 'I think I shall fight a duel to-morrow,' might not the seller answer,

'I do not want to know your purpose; I have nothing to do with it; that is your business; mine is to sell the pistols, and I look only to the profit of trade.' No doubt the act would be immoral, but I have felt a doubt whether it would be illegal; and I should feel it still but that the authority of *Cannan v. Bryce* and *McKinnell v. Robinson* concludes the matter." These words exactly indicate the distinction between this class of contracts and those described in (iii). It is not necessary the parties to a contract *prima facie* innocent should bind themselves to adapt it to an illegal purpose in order to avoid it. It is enough that the [See *Spur-
geon v. Mc-
Elwain*, 6
Ohio, 444.] one party knows the unlawful intent of the other, and knows that the contract is intended to be applied to carry it out. (a)

But a loan of money, designed to satisfy debts arising from a past illegal transaction, is distinguishable from the cases just cited. In *Cannan v. Bryce* the statute had forbidden, not only stock-jobbing transactions of a certain sort, but advances of money to pay debts arising from them; in the other two cases the illegality was still in contemplation when the contract was made.

And so in *Pyke's case* a loan of money intended to pay lost bets was held to be recoverable from the estate of the bankrupt borrower. "The mischief had been completed," said JESSEL, M. R., "the illegal act had been carried out, before the money was lent. The money was advanced to enable the borrower

(a) [There is a direct conflict of authority in this country upon the question whether a person can recover the price of goods sold or work done in making an article, when he knew that the article was to be used for an illegal purpose, but did nothing to assist in that act. See *Rocquemor v. Alloway*, 33 Tex. 461, and *Oxford Iron Co. v. Spradling* 46 Ala. 99, which hold that the contract cannot be enforced, and *Michael v. Bacon*, 49 Mo. 474; *Gardner v. Barger*, 4 Heisk. (Tenn.) 668; *Walker v. Jeffries*, 45 Miss. 160; *Armfield v. Tole*, 7 Ired. 259; *Kreiss v. Seligman*, 8 Barb. (N. Y.) 439, which hold the opposite view.]

to pay the bets which he had already made and lost, which seems to me an entirely different thing from a loan of money to enable a man to make a bet."

Where the unlawful intention is on one side only.

Innocent party may avoid contract. (v) Where one of two parties intends a contract, innocent in itself, to further an illegal purpose, and the other enters into the contract in ignorance of his intention, the innocent party may, while the contract is still executory, avoid it at his option. In *Cowan v. Milbourn*, the plaintiff sued the defendant for breach of an agreement to let him a set of rooms. It appeared that the plaintiff intended to use the rooms for the purpose of delivering lectures which were unlawful, as being blasphemous within the meaning of 9 & 10 Will. III., c. 32. The defendant was not aware of the use to which the plaintiff meant to put the rooms at the time the agreement was made; and he subsequently refused to allow the plaintiff to use them, though he did not at first allege the character of the

L. R. 2 Exch. 230,
and see Clay v. Yat, 1 H. & N. 73.
lectures as the ground of his refusal. It was held that he was entitled to avoid the contract, and was not bound to give his reasons. (a)

Securities for money due on illegal transactions.

Securities for money due on illegal transaction. (vi) Where a promise has been given to secure the payment of money due or about to become due upon an illegal transaction, the validity of such a promise is based upon two considerations:

a. Whether the transaction is illegal or void.

b. Whether or no the promise is made under seal.

Where the promise is given in the form of a nego-

(a) [When the plaintiff was ignorant of the evil design of the defendant in making the contract, the wrong doer, when sued, cannot set up the defense that the contract was entered into by himself for an illegal purpose. *Quirk v. Thomas*, 6 Mich. 70.]

tiable instrument, a further question arises as to its value in the hands of third parties, and this is affected by the answer to the first of the considerations above stated. *187

There is a difference, not very easy to analyze but of considerable practical importance, between cases in which Common Law or Statute make an object illegal, and cases in which they make a transaction void. The distinction has been thus stated: "A thing may be unlawful in the sense that the law will not aid it, and yet well, B., in that the law will not immediately punish it;" but this *dictum* does not exactly describe the difference between the cases, inasmuch as it does not cover all the cases in which the difference exists. A bet upon a cricket match, for example, is not punishable, but it is more than merely void, as has already been explained.

Per Bramwell, B.
Cowan v. Milbourn,
L. R. 2 Exch. 230.

Distinction between
'illegal'
'void.'

The effect of the difference is this, that in the one case the promise is regarded as given upon an illegal consideration, in the other upon no consideration at all; in the one case everything connected with the transaction is "tainted with illegality," in the other collateral contracts arising out of the avoided transaction are under certain circumstances supported.

The 'taint of illegality.'
Per Curiam in Fisher v. Bridges, 3 E. & B. 612.

In cases where the transaction is illegal, a promise under seal given to secure the payment of money due upon it is void. This was decided in the case of *Fisher v. Bridges* by the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench. The plaintiff sued the defendant upon a covenant to pay a sum of money. The defense was, that the covenant was security for the payment of a sum of money due upon a purchase of land agreed to be sold for a purpose declared to be illegal by Statute. 12 Geo. II. c. 28. The Court of Queen's Bench held that the defendant was bound, inasmuch as there was nothing unlawful in a simple promise to pay money. The Court of Ex-

chequer Chamber held that the illegality when proved tainted the subsequent promise, and that this *188 was not a simple promise to pay money, but that it "sprang from and was the creature of an illegal transaction."

If a promise under seal would be void under these circumstances, it is obvious that a parol contract, even if based in part upon some new consideration, would be void also.

Negotiable instruments,
how affected by contract being illegal.

In the case of negotiable instruments we have to consider not only the effect of the illegality as between the original parties to the contract, but its effect upon subsequent holders of the instrument. In these cases, as we have already noticed, the ordinary presumption in favor of the holder of such an instrument does not exist. Upon proof of the illegality which tainted the instrument in its inception, the holder is liable to have to show that he is a holder for value; that is to say, that he gave consideration for the bill: and even then, if he can be proved to have been aware of the illegality, he will be disentitled to recover.

Effect of contract being void,

a. on promise under seal;

5 & 6 Will.
IV. c. 76.

Where the consideration is not illegal but the transaction is void, a promise given to pay money due upon such a transaction is based upon no consideration at all. If made under seal it is binding, if by parol it is void. A good illustration of this rule is to be found in the case of contracts from which some formality necessary to the validity of the contract has been omitted. A covenant to pay money due upon a contract of this nature is binding. Thus where a corporation borrowed money upon mortgage without having first obtained the approbation of the Lords of the Treasury, they did what the Municipal Corporations Act declared to be "unlawful;" but having received the mortgage money and entered into a covenant to repay it, they were held bound by their covenant: "Al-

though the mortgage may be invalid, that is no reason Payne v.
why the corporation should not be liable upon their Mayor of
covenant to repay the mortgage money." So too in & N. 579.
the case of promises of payment made in consideration b. on parol
of past illicit cohabitation, such promises are contracts:
invalid if made by parol, not on the ground that *189 Beaumont v.
the consideration is illegal, but because there is Reeve, 8 Q.
in fact no consideration at all. But a bond given upon B. 433.
such past consideration would be binding. Ayerst v.
Jenkins, L. R. 16 Eq. 275.

Negotiable instruments given upon such considera- c. on nego-
tions are, as between the original parties to them, void, tiable in-
for the reason just stated, that they are simple struments.
contracts in which the promise is made in consideration
of a transaction which raises no legal obligation, and
therefore cannot support it. But where the negotiable
instrument has passed into the hands of a subsequent
holder, such a holder is not affected by the fact that as
between the original parties the promise is voluntary.
In *Fitch v. Jones*, a promissory note was given by the 5 E. & B. 245.
defendant to X in payment of a bet made on the
amount of hop duty in the year 1854. X indorsed
the note to the plaintiff. The main question for the
Court was, "whether the plaintiff was bound on proof
of the origin of the note to show that he had given
consideration for the note, or whether it was for the
defendant to show that he had given none."

"I am of opinion," said Lord CAMPBELL, "that the
note did not take its inception in illegality within the
meaning of the rule. The note was given to secure
payment of a wagering contract, which, even before
Stat. 8 & 9 Vict. c. 109, the law would not enforce:¹
but it was not illegal: there is no penalty attached to
such a wager; it is not in violation of any statute, nor

¹ It had been held in a previous case, *Atherfold v. Beard*, that a 2 T. R. 610.
wager on the amount of hop duty was against public policy; be-
cause the evidence at the trial would expose to the world the
amount of the public revenue.

of the Common Law, but is simply void, so that the consideration was not an illegal consideration, but equivalent in law to no consideration at all." (a)

Can a man be relieved from a contract which he knew to be unlawful?

Illegality known at the time, no ground for avoidance,
Begbie v. Phosphate Sewage Co.,
L. R. 10 Q. B. 499.

unless plaintiff be not *in pari delicto*, or a *locus poenitentiae* remains.

(vii) It remains to consider whether a party to an illegal contract can under any circumstances *190 make it a cause of action. We may lay down without hesitation the rule that a party to such a contract cannot come into a Court of Law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The general rule is well expressed in the maxim, "*in pari delicto potior est condition defendantis*"

But there are some exceptional cases in which a man may be relieved of an illegal contract into which he has entered, cases to which the maxim just quoted does not apply. These would appear to group themselves into two classes: (1) cases in which the plaintiff has been induced to enter into the contract under the influence of fraud or strong pressure; (2) cases in which the contract being unperformed, money paid or goods

(a) [The decided weight of American authorities is to the effect that when a note is made void by statute it cannot be collected by an innocent holder for value who purchased before maturity. See *Farris v. King*, 1 Stew. (Ala.) 253; *Aurora v. West*, 22 Ind. 88; *Buyley v. Taber*, 5 Mass. 236; *Bridge v. Hubbard*, 15 Mass. 96; *Unger v. Boas*, 13 Pa. St. 601; *Mordecai v. Dawkins*, 9 Rich. (S. C.) L. 262; *Andrews v. Hoxie*, 5 Texas. 171; *Graves v. Clark*, 21 La. Ann. 567. But, see *Poe v. Justices*, Dudley (Ga.) *contra*. But when the note is not made void by statute it can be collected by a *bona fide* holder even if the consideration is illegal. *Thorne v. Yorte*, 4 Cal. 321; *Meadow v. Bird*, 22 Ga. 246; *Johnson v. Dickson*, 1 Blackf. (Ind.) 256; *Knox v. White*, 20 La. Ann. 326; *Wentworth v. Blaisdell*, 17 N. Y. 275; *Rockwood v. Charles*, 2 Hill, (N. Y.) 499. But see, *contra*, *Brisbane v. Lesterjette*, 1 Bay. (S. C.) 113; *Lucas v. Waul*, 12 Sm. & M. (Tenn.) 157.]

delivered in furtherance of it have been held recoverable.

The first class of cases are best illustrated by the decisions in *Reynell v. Spryse* and *Atkinson v. Denby*.¹ D. M. & G. In the first case the plaintiff had been induced, by the fraud of the defendant, to make a conveyance of property in pursuance of an agreement which was illegal on the ground of champerty. He sought to get the conveyance set aside in Chancery. It was urged that the parties were *in pari delicto*, and that therefore his suit must fail; but the Court being satisfied that he had been induced to enter into the agreement by the fraud of the defendant, considered that he was entitled to relief. "Where the parties to a contract against public policy, or illegal, are not *in pari delicto* (and they are not always so), and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given him."²

The case of *Atkinson v. Denby* is a peculiar one, and appears almost to indicate an approach on the part of the Common Law Courts to the equitable doctrine of Undue Influence. The plaintiff, a debtor, offered his creditors a composition of 5s. in the pound. The defendant was one of the creditors, and his acceptance or rejection of the offer was known to be certain to determine the decision of several other creditors. He refused to assent to the composition unless the plaintiff would make him an additional payment of £50, in fraud of the other creditors. This was done: the composition arrangement was carried out, and the plaintiff sued to recover the £50, on the ground that it was a payment made by him under oppression and in fraud of his creditors. It was held that he could recover; and the Court of Exchequer Chamber, in affirming the judgment of the Court of Exchequer, said, "It is said that both parties are *in*

pari delicto. It is true that both are *in delicto*, because the act is a fraud upon the other creditors; but it is not *par delictum*, because *the one has power to dictate, the other no alternative but to submit.*"

The second exception to the general rule may best be stated in the words of MELLISH, L. J., in *Taylor v. Bowers*. "If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out, but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done."

The case was one of a fictitious assignment of goods to a third party with a view to defraud the creditors. The goods were then assigned to the defendant, and the plaintiff, the debtor, demanded them back. Nothing had been done towards carrying out the fraudulent intention of the parties, and the plaintiff was held entitled to recover. The rule seems to come to this, that until an illegal purpose is carried out there is a *locus poenitentiae* for one who has contributed

*192 goods or money for such a purpose. The case of *Hampden v. Walsh* is another illustration of

1 L. R. Q. B.
D. 189.

the same rule. The plaintiff and another person each deposited £500 with the defendant to abide the decision of two scientific men as to the shape of the earth; the decision went against the plaintiff, but before the money was paid over he claimed it back, and it was held that he was entitled to recover it. He had repudiated the wager before the money had left the hands of the stakeholder, and the Court held, on the authority of several cases, that the 8 & 9 Vict. c. 109. s. 18 did not deprive a party to a contract, thereby rendered void, from repudiating the contract and recovering the money advanced before it had been paid.

Varney v.
Hickman, 5
C. B. 271.
Martin v.
Hewson, 10
Ex. 737.

PART III.

#193

THE OPERATION OF CONTRACT.

We have now concluded the subject of the Formation of Contract. We have noted the various elements which must needs co-exist in a valid contract, and we have further noted the effect which the absence of one of such elements produces upon the validity of a contract; making it void, as in the case of a mistake, or voidable, as in the case of fraud, or simply unenforceable, as in the case of the neglect of certain statutory forms.

20 Car. I.L.
c. 3, a. 4.

We come now to deal with the effects of a valid contract when formed. We have to regard the contract as possessing the needed elements of agreement and obligation, and we have to ask, To whom does the obligation extend? Who have rights and liabilities under a contract? And then this further question arises, Can these rights and liabilities be assigned or pass to others than the original parties to the contract?

We may lay down two general rules, which we will proceed to explain and illustrate.

(1) No one but the parties to a contract can be bound by it or entitled under it.

(2) Under certain circumstances the rights and liabilities created by a contract may pass to a person or persons other than the original parties to it, and this may take place, either (*a*) by act of the parties, (*b*) by rules of law operating in certain events.

*194 These two rules seem at first to look like one rule subject to certain exceptions, but they are in fact distinct. The obligation binds only the parties to the agreement; but these parties, having created the obligation which binds them to one another, may in certain ways and under certain circumstances be replaced by others who assume their rights or liabilities under the contract. The rules may perhaps be made clearer by an illustration:

(1) If John Doe make a contract with Richard Roe, that contract cannot impose liabilities or confer rights upon John Styles.

(2) But there are circumstances under which John Doe or Richard Roe may substitute John Styles for himself as a party to the contract, and there are circumstances under which, given certain relations between John Doe and John Styles, the latter would acquire the rights and liabilities of the former by operation of law.

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CHAPTER I.

*195

THE LIMITS OF THE CONTRACTUAL OBLIGATION.

We may safely lay down the general rule that a person, who is not a party to a contract, cannot be included in the rights and liabilities which the contract creates so as to enable him to sue or be sued upon it. This is not only established by decided cases, but seems to flow from the very conception which we form of contract. A contract is an agreement between two or more persons, by which an obligation is created, and those persons are bound together thereby. If the obligation takes the form of a promise by A to X, to confer a benefit upon M, the legal relations of M are nevertheless unaffected by that obligation. He was not a party to the agreement. He was not bound by the *vinculum juris* which it created, and the breach of that legal bond cannot affect the rights of a party who was never included in it. (a)

Nor, again, can liability be imposed on such a third party unless he be a party to the contract. One characteristic of the contractual as opposed to other forms of obligation consists in this, that the restraint which it imposes on individual freedom is voluntarily created by those who are subject to it, is, in fact, the creature of agreement.

To this rule there are some apparent exceptions which it may be well to dismiss before proceeding to illustrate the rule from decided cases.

(a) [See note on page 72.]

Principal
and agent.

See App. B.
on Agency.

Trustee and
cestui que
trust.

The relation of principal and agent forms an apparent exception to the rule just laid down. The principal incurs liabilities and acquires rights under contracts which are made between his agent and other parties. But the exception is no more than apparent. The agent is, in reality, only the servant, or the mouthpiece of the principal. The principal acquires his rights and liabilities because he authorized the contract before, or ratified it after the agent made it. If the agent exceeds such authority as is actually or presumably given, he cannot bind the principal without ratification, nor then unless he has acted professedly as agent. It is true that if the agent contracts in his own name he may be made liable upon the contract, but so may his principal, and it would seem in cases of this nature that it is the principal who is the primary contracting party, but that the agent has by his conduct entitled the person with whom he dealt to affix upon him the liabilities of the contract.

In the case of principal and agent therefore we must regard the two as one in the eye of the law, and the apparent exception which they present to the rule as having no real existence.

A trust has this in common with contract, that it originates in agreement, and that among its other objects it aims at creating obligations. If we could really place a trust upon the footing of a contract we might say that it formed a very real and substantial exception to the general rule which we have laid down. There can be no doubt that the creator of a trust and the trustee do, by agreement, bring rights into existence which a third party, the *cestui que trust*, may enforce. But it is better at once to set aside trusts from the discussion, and for this reason. Contract differs from other forms of agreement in having for its sole and direct object the creation of an obligation. The

contractual obligation differs from other forms of obligation mainly in taking its origin in the voluntary act of the parties obliged. A trust and the obligations resulting from a trust correspond to neither of these characteristics. The *agreement* which creates a trust has many other objects besides the creation of obligations, these objects may include *197 conveyance, and the subsequent devolution of property. The *obligation* which exists between trustee and *cestui que trust* does not come into existence by the act of the parties to it. It is better, therefore, having noted the similarities between the contractual and the fiduciary obligation, to dismiss the latter altogether from our inquiries.

We may now proceed to illustrate the general proposition laid down at the commencement of this chapter: and it will appear from what has gone before that the proposition is susceptible of a twofold division. A man cannot incur liabilities, and again, a man cannot acquire rights, from a contract to which he is not a party.

§ 1. A man cannot incur liabilities from a contract to which he was not a party.

This proposition is a part of a wider rule to the effect that liability *ex contractu* or *quasi ex contractu* cannot be imposed upon a man otherwise than by his act or consent. A cannot by paying X's debts unasked, make X his debtor; "a man cannot, of his own will, pay another man's debt without his consent and thereby convert himself into a creditor." (a)

And in like manner A and M cannot, by any con-

(a) [But by the law merchant where a bill of exchange has been protested for non-payment a third party may pay it for the honor of prior parties and charge them. *Mertens v. Winnington*, 1 Esp. 112; *Wood v. Pugh*, 7 Ohio, Pt. 2, 156; *Boring v. Clark*, 19 Pick. (Mass.) 220.]

Contract
cannot im-
pose liabil-
ity upon a
third party.

Durnford v.
Messiter, 5
M. & S. 446,
and see App.
A. p. 325.

[See, also,
*Kaye v. Dut-
ton*, 7 Mass.
& G. 807.]

tract into which they may enter, thereby impose liabilities upon X. An illustration of this rule is afforded
6 Taunt. 147. in the case *Schmaling v. Tomlinson*. The defendants in that case employed X, a firm of brokers, to transport a quantity of cocoa from London to Amsterdam. X agreed with the plaintiff to put the whole conduct of the transport into his hands; he did the work and sued the defendants for his expenses and commission. It was held that the defendants were not liable, inasmuch as there was no privity between them and the plaintiff; that is to say, that there was nothing either by writing, words, or conduct to connect them with the plaintiff in the transaction. X was employed by the defendants to do the whole work for them,
*198 and there was held to be "no pretence that the defendants ever authorized them to employ any other to do the whole under them: the defendants looked to X only for the performance of the work, and X had a right to look to the defendants for payment, and no one else had that right."

But does a contract impose a *duty* on third parties?

A contract then cannot impose the burdens of an *obligation* upon one who is not a party to it, but the case of *Lumley v. Gye* raises the question whether it can impose a *duty*, upon persons extraneous to the obligation, not to interfere with its due performance. We use the term *duty* as opposed to *obligation* as signifying that necessity which rests upon all alike to respect the rights which the law sanctions, while *obligation* signifies a special tie binding together definite and assignable members of the community.

2 E. & B. 216. In *Lumley v. Gye* the plaintiff, being the manager of an opera house, engaged a singer to perform in his theater. The defendant induced her to break her contract. The plaintiff sued the defendant for procuring this breach, and the questions raised took the following form: It was argued that an action would lie against one who procured the breach of any kind of

contract, but that if that were not so an action would lie, at any rate, for inducing a servant to quit the service of his master.

It may be taken that the relations of master and servant have always been held to involve a right on the part of the master to bring an action against any one servant who enticed away his servant, and so the Court was called upon to answer two questions: Does an action lie for procuring a breach of any contract? if not, then does the exceptional rule applicable to the contract of master and servant apply to the manager of a theater and the actors whom he engages to perform?

The majority of the Court answered both these questions in the affirmative. COLERIDGE, J., in an elaborate dissenting judgment answered both in the negative, holding that the action "could not be maintained, first, merely to induce or procure a free contracting party to break his covenant, whether done maliciously or not, to the damage of another is . . . not actionable; second, that the law with regard to seduction of servants from their masters' employ, in breach of their contract, is an exception, the origin of which is known,¹ and that that exception does not reach the case of a theatrical performer."

The case stands alone (it was decided in 1853), and no reported attempt has since been made to bring an action for a like cause. But it is important to bear in mind that a considered judgment of the Court of Queen's Bench has laid it down that a contract confers upon the parties to it rights *in rem* as well as rights *in personam*; that it not only binds together the parties by an obligation, but that it imposes upon all the world a duty to respect the contractual tie.

¹ The exception which the law of Master and Servant seems to have engrailed upon the Common Law in this matter is traced by the learned Judge, in a detailed historical argument, to the Statutes of Laborers.

§ 2. A man cannot acquire rights under a contract to which he is not a party.

Contract can not confer rights on a third party, This is a rule which admits of fuller illustration than the one which we have just been discussing. It is contrary to the common sense of mankind that M should be bound by a contract made between X and A. But if A and X make a contract in which X promises to do something for the benefit of M, all three may be willing that M should have all the rights of an actual contracting party; or if A, and a group of persons which we will call X, enter into a contract, it might be convenient that M should be able to sue on behalf of the multitude of which X consists.

at Common Law, Where a contract is made by A and X for the benefit of M it is certain that M cannot sue at Common Law; and the current of judicial opinion runs strongly against his being able to sue in equity. (a)

4 B. & Ad. 433. *200 In *Price v. Easton* the plaintiff sued upon a promise made by the defendant to X that in consideration that X would work for him he would pay the plaintiff a sum of money. It was held by the Court of Queen's Bench that the plaintiff could not recover because he was not a party to the contract, the members of the Court stating in different forms the same reason for their decision. Lord DENMAN, C. J., said that the declaration did not "show any consideration for the promise moving from the plaintiff to defendant." LITLEDALE, J., said, "No privity is shown between the plaintiff and the defendant." TAUNTON, J., that it was "consistent with the matter alleged in the declaration that the plaintiff may have been entirely ignorant of the arrangement between X and the defendant;" and PATTESON, J., that there was "no promise to the plaintiff alleged."

(a) [See note to page 72.]

It was at one time thought that if the person who not even if was to take a benefit under the contract was nearly ^{near of kin} to the promisee related by blood to the promisee a right of action ^{to the promisee} would vest in him. But this doctrine was finally overruled in the case of *Tweddle v. Atkinson* by the Court of Queen's Bench. The facts of that case were as follows: M and N married, and after the marriage a contract was entered into between A and X, their respective fathers, to the effect that each should pay a sum of money to M, *and that M should have power to sue for such sums.* After the death of A and X, M sued the executors of X for the money promised to him. It was held that the action would not lie, and WIGHTMAN, J., said, "Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne v. Mason*, in which it was held that the daughter of a physician might maintain *assumpsit* upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit."

Until very recently there was no doubt that a third party could not sue alone in equity for benefits intended to be conferred upon him by the contract, although there is authority for saying that he could join as co-plaintiff in a suit brought by the actual promisee.

The mode in which the question has most commonly been raised of late is in the case of articles of association of a Company, in which the directors are empow-

ered by the shareholders to pay a sum of money to an original promoter of the Company, or to one who has given labor or money towards the starting of its existence.

Melhado v. Porto Alegre Railway Co., L. R. 9 C. P. 503. The Common Law Courts have been unhesitating in their decision that no right of action accrues to the intended beneficiary under such a provision. But in the

Touche v. Metropolitan Warehousing Co., L. R. 6 Ch. 671. Court of Appeal in Chancery it has, in one case, been held that he can sue, and Lord HATHERLEY is reported to have said that the case came "within the authority that where a sum is payable by A B for the benefit of C D, C D can claim under the contract as if it had been made with himself."

L. R. 1 Ex. D. 88 (C. A.) But the most recent decision on this subject seems to place the relation of the parties on a footing which makes the above quoted *dictum* inapplicable to this class of case. In *Eley v. Positive Government Security Life Assurance Company*, one of the articles of association of the defendant Company provided that the plaintiff should be employed as its permanent solicitor. The action was brought for a breach of contract in not employing the plaintiff. Lord CAIRNS, in delivering the judgment of the Court of Appeal, says,

See Ashbury v. Riche, L. R. 7 H. L. at *202 p. 667. "Articles of association, as it is well known, follow the Carriage Co. memorandum, which states the objects of the Company, while the articles state the arrangement between the members. They are an agreement *inter socios*, and in that view if the introductory words are applied to Article 118, it becomes a covenant between the parties to it that they will employ the plaintiff. Now so far as that is concerned it is *res inter alios acta*, the plaintiff is no party to it. No doubt he thought that by inserting it he was making his employment safe as against the Company; but his relying on that view of the law does not alter the legal effect of the articles. This article is either a stipulation which would bind the members, or else a man-

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date to the directors. In either case it is a matter between the directors and shareholders, and not between them and the plaintiff."

This decision appears to be conclusive on this special aspect of the general rule. Nevertheless the breadth of the language used by the Court in *Touche's* L. R. 6 Ch. case makes it impossible to say that there is no doubt ^{871.} as to the operation of the rule in excluding the acquisition by third persons of equitable rights under a contract. See Pollock on Contracts, 198.

Attempts have been made, but without success, to break the general rule in the case of unincorporated companies and societies who wish to avoid bringing action in the names of all their members. To this end they introduce into their contracts a term to the effect that their rights of action shall be vested in a manager or agent. Such a case is that of *Gray v. L. R. 5 C. P. Pearson*, where the managers of a Mutual Assurance Company, not being members of it, were authorized, by powers of attorney executed by the members of the Company, to sue upon contracts entered into by them as agents on behalf of the Company. They sued upon a contract so entered into, and the Court of Common Pleas held that they could not maintain the action, "for the simple reason — a reason not applicable merely to the procedure of this country, but one affecting all sound procedure — that the proper person to bring an action is the person whose right has been violated." ^{569.} Per Willes, J., at p. 574 And MONTAGUE SMITH, J., said, "This is an attempt to do what has been frequently but *203 fruitlessly attempted before, viz., to get rid of the difficulty of a large number of people suing in their own names — to appoint a public officer without obtaining an Act of Parliament or a Charter of Incorporation.

204*CHAPTER II.****THE ASSIGNMENT OF CONTRACT.**

Assignment
of contract

We now come to discuss the cases in which the contractual obligation may pass to one who was not a party to the original agreement. We have seen that a contract cannot affect any but the parties to it; but the parties to it may under certain circumstances drop out and others take their places, and we have to ask, first, how this can take place by the voluntary act of the parties themselves, or one of them.

§ 1. Assignment by act of the parties.

This part of the subject also falls into two divisions, the assignment of liabilities and the assignment of rights, and we will deal with them in that order.

Assignment of liabilities.

Liabilities
cannot be
assigned.

A man cannot assign his liabilities under a contract.

Or we may present the matter from the point of view of the other party to the contract, and say that a man cannot be compelled to accept performance of the contract from one who was not originally a party to it.

The rule seems to be based on sense and convenience. It is not merely that a man is entitled to know to whom he is to look for the satisfaction of his rights under a contract; but, to use the language of Lord 12 Q. B. 317. DENMAN, in *Humble v. Hunter*, "you have a right to the benefit you contemplate from the character, credit, and substance of the person with whom you contract."

The rule is well illustrated by the case of *Robson & Sharpe v. Drummond*. Sharpe undertook to supply the defendant with a carriage and Daly, 259.] *205 2 B. & Ad. 803. [Hayes v. Willis 4

keep it in repair, on certain annual payments, for five years. Robson was in fact the partner of Sharpe, but the defendant contracted with Sharpe alone. After three years had expired Sharpe retired from business, and the defendant was informed that Robson was thenceforth answerable for the repair of the carriage, and would receive the payments. The defendant refused to accept the substitution of Robson for Sharpe, and threw up the contract. Upon this Robson and Sharpe sued him, but the Court held that so far as Sharpe was concerned, he had put an end to the contract, and that his liabilities could not be transferred to Robson without the defendant's consent. "The defendant," said Lord TENTERDEN, "may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe.... The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone and not with any other person."

There are however two exceptions to this rule. The first is more apparent than real, and occurs when a party liable under a contract substitutes another for himself with the consent of the party to whom he is liable. But this is in effect the rescission, by agreement, of one contract and the substitution of a new one, in which the same acts are to be performed by different parties. The second arises where an interest in land is transferred, and such obligations as attach to the enjoyment of the interest pass with it from the transferor to the transferee. This however is a matter to be discussed separately, for there are certain features connected with the obli-

gations attached to land which distinguish them from other promises and call for particular attention.

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Assignment of rights.

(i) AT COMMON LAW.

Assignability of the benefit of a contract:

Powles v. Innes, 11 M. & W. 10. [McKinney v. Alvis, 14 Ill. 33.] at common law only by substituted agreement;

Per Lord Tenterden, C. J., Fairlie v. Denton, 8 B. & C. 400. [Heaton v. Angier, 7 N. H. 397.]

in cases of debt;

Cuxon v. Chadley, 3 B. & C. 591.

At Common Law, apart from the customs of the Law Merchant, the benefit of a contract, or a *chose in action*, cannot be assigned so as to enable the assignee to sue upon it in his own name. He must sue in the name of the assignor or his representatives; or rather, the Common Law so far takes cognizance of such equitable rights as are created by the assignment that the name of the assignor may be used as trustee of the benefits of the contract for the assignee.

The only mode by which the rights under a contract can be really transferred is not, strictly speaking, by assignment at all, but by means of a substituted agreement.

If A owes M £100, and M owes X £100, it may be agreed between all three that A shall pay X instead of M, who thus terminates his legal relations with either party. In such a case the consideration for A's promise is the discharge by M; for M's discharge of A, the extinguishment of his debt to X; for X's promise, the substitution of A's liability for that of M.

But there must be ascertained sums due from A to M and from M to X; and it is further essential that there should be a definite agreement between the parties, for it is the promise of each which is the consideration for those given by the others. Thus it is not enough that A should say to X "I will pay you instead of M," and should afterwards suggest the arrangement to M and receive his assent.

Nor it is enough that M should in writing authorize A to pay to X the debt due from A to himself, and

that A should write "acknowledged" at the foot of the document: X cannot sue A for the money. These were the facts in *Liversidge v. Broadbent*. M owed *207 603. money to the plaintiff who required security for his debt. M thereupon, being owed money by the defendant, gave to the plaintiff a paper authorizing the defendant to pay the money to him (the plaintiff); this paper the defendant "acknowledged" in writing; but on his being sued for the money, the Court of Exchequer held that such an acknowledgment gave no right of action.

It will be observed that in neither of these cases was there such an agreement as amounted to a discharge by M of the debt due to him from A; there was therefore no consideration for A's promise to pay X, and on that ground X would be unable to maintain an action against A.

In the case last mentioned, MARTIN, B., thus gave reasons for holding that X could not recover:

"There are two legal principles which, so far as I know, have never been departed from: one is that, at Common Law, a debt cannot be assigned so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument; and that being the law, it is perfectly clear that M could not assign to the plaintiff the debt due from the defendant to him....The other principle which would be infringed by allowing this action to be maintained is the rule of law that a bare promise cannot be the foundation of an action....No doubt a debtor may, if he thinks fit, promise to pay his debt to a person other than his creditor; and if there is any consideration for the promise he is bound to perform it. But here there was none whatever. There was no agreement to give time, or that the debt of M should be extinguished—no indulgence to him or detriment to the plaintiff. There was nothing in the nature of a consideration

Per Martin,
B. Liver-
sidge v.
Broadbent,
4 H. & N.
610.
[McKinney
v. Alvis, 14
Ill. 33.]

or by custom
of mer-
chants.

Assignabil-
ity of con-
tracts in
equity.

is subject to
certain con-
ditions.

moving from the plaintiff to the defendant, but a mere promise by the defendant to pay another man's debt."

It is thus apparent that a contract cannot be assigned at Common Law except (1) by an agreement between the original parties to it and the intended assignee,

which is subject to all the rules for the formation of a valid contract, and which is limited in its operation to the transfer of a debt; or (2) by the rules of the Law Merchant under circumstances to be noted presently.

(ii) IN EQUITY.

Equity will permit the assignment of a *chase in action*, or the rights which a man possesses under a contract, whenever the contract is not for exclusively personal services; and a suit in equity may be maintained by the assignee in his own name.

But certain conditions affect the rights of the assignee.

(a) The assignment will not be supported unless consideration has been given by the assignee. (a)

(b) It will not bind the person liable until he has received *notice*, although it is effectual as between assignor and assignee from the moment of the assignment.

(c) The assignee takes subject to all such defenses as might have prevailed against the assignor. In other words, the assignor cannot give a better title than he has got.

These last two propositions require some illustration.

Notice.

Notice.

It is fair upon the person liable that he should know

(a) [But see *Pulvertoft v. Pulvertoft*, 18 Vesey, 84; *Mayo v. Carrington*, 19 Grattan, 124, where it is held that the consideration can only be questioned by the assignor.]

to whom his liability is due. So if he receive no notice that it is due to another than the party with whom he originally contracted, he is entitled to the benefit of any payment which he may make to his original creditor. A convenient illustration is furnished in the case of covenants to pay interest on a mortgage debt. If the mortgage be assigned by the mortgagee without notice to the mortgageor, and interest be afterwards paid by the mortgageor to the duly authorized agent of the mortgagee, the money so paid, though due to the assignee, cannot be recovered by him from the debtor. We may put the case thus: Money is due at regular intervals from A to X, and is ordinarily paid by A to the agent of X: X assigns his interest in the debt to M. A receives no notice but continues to pay the money to X's agent: the money so paid cannot be recovered by M from A.

The *rationale* of the rule is thus expounded by TURNER, L. J., in *Stocks v. Dobson*: "The debtor is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it." [Ward v. Morrison, 25 Vt. 593.] If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law. The assignee has no legal right, and can only sue in the assignor's name. How can he sue if the debt has been paid? If a Court of Equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the Court has therefore required notice to be given to the debtor of the assignment *in order to perfect the title of the assignee.*"

And the same case is authority for this further position, that "equitable titles have priority according to the priority of notice." The successive assignees of an obligation rank as to their title, not according to the dates at which the creditor assigned his rights to

them respectively, but according to the dates at which they gave notice to the party to be charged.

Title.

Assignee
takes subject
to equities.

Crouch v.
Credit Fon-
cier, L. R. 8
Q. B. 380.

Mangles v.
Dixon, 3 H.
L. C. 735.

[Murray v.
Lylburn, 2
Johns. Chy.
441.]

"The general rule, both at law and in equity, is that no person can acquire a title, either to a *chose in action* or any other property, from one who has himself no title to it." And further, "if a man takes an assignment of a *chose in action*, he must take his chance as to the exact position in which the party giving it stands."

The facts of the case last cited will afford an apt illustration of this proposition.

M chartered half his vessel to X, using the *210 other half himself and taking half the risks of the adventure. The form in which the agreement between the parties was expressed was this: M and X executed a charter party whereby X appeared as sole charterer: by a second document a clerk of M undertook the payment of half the freight and half the risk of the adventure; and by a third document M guaranteed to X the performance by his clerk of the undertaking contained in the second document. The whole arrangement was *bona fide*, and its peculiarities arose from the difficulty created by M being the charterer of a portion of his own vessel.

Subsequently M assigned the charter to A for a large sum, without communicating to him the accompanying documents which divided both the profits and the risks between the owner M and the charterer X. A sued at Common Law in the name of M and recovered the whole freight, the Court of Exchequer holding that X was bound on the true construction of the agreements to pay over the freight to M in the first instance

Boyd v. Man-
gles, 8 Ex.
395.

and afterwards settle the balance of profit and loss. X applied to the Court of Chancery to have an account taken in respect of the joint adventure, and to restrain

A from proceeding on the Common Law judgment. It was held by the House of Lords that A must stand in the same position with M as to the whole agreement, that he was not entitled to more than a moiety of the *Mangles v. Dixon, 3 H. L. C. 735.* freight, and was liable for half the losses of the venture.

In like manner, if one of two parties be induced to enter into a contract by fraud, and the fraudulent party assign his interest in the contract for value to X, who *Graham v. Johnson, L. R. 8 Eq. 38.* is wholly innocent in the matter, the defrauded party may get the contract set aside in equity in spite of the interest acquired in it by X.

It is possible, however, that two parties to a contract may stipulate that if either assign his rights under it, such an assignment shall be "free from equities;" that is to say, that the assignee *211 shall not be liable to be met by such defenses as would have been valid against his assignor. It is questionable, however, whether such a stipulation would protect the assignee against the effects of *Ex parte Asiatic Banking Corporation, L. R. 2 Ch. at p. 397.* Fraud, or any vital defect in the formation of the original contract.

NEGOTIABILITY.

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So far we have dealt with the assignability of contracts at Common Law and in Equity, and it would appear that under the most favorable circumstances the assignment of a contract binds the party chargeable to the assignee only when notice is given to him, and subject always to the rule that a man cannot give a better title than he possesses in himself.

We now come to deal with a class of promises the benefit of which is assignable in such a way that the promise may be enforced by the assignee of the benefit without previous notice to the promisor, and without the risk of being met by defenses which would have been good against the assignor of the promise. In

other words, we come to consider *negotiable instruments* as distinguished from *assignable contracts*.

**Features
of negotia-
bility.**

The essential features of *negotiability* appear to be these:

Firstly, the written promise gives a right of action to the holder of the document for the time being, though he and his holding may be alike unknown to the promisor.

Secondly, the holder is not prejudiced by defects in the title of his assignor; he does not hold subject to such defenses as would be good against his assignor.

Negotiability would seem to exist partly by custom and partly by statute.

**Negotiabil-
ity by cus-
tom.**

Rumball v.
Metropol-
itan Bank,
L. R. 2 Q. B.
D. 194.

by statute.

Certain contracts are negotiable by the custom of merchants recognized by the Courts; such are bills of exchange, foreign and colonial bonds expressed to be transferable by delivery, and scrip certificates which entitle the bearer to become a holder of such bonds or of shares in a company.

Certain other contracts have been made negotiable by statute as promissory notes by 3 & 4 Anne, c. 9, [which has been substantially re-enacted by the Legislatures of the different States.]

*213 Bills of lading, which are affected both by the law merchant and by statute, possess some characteristics which will call for a separate consideration.

Bills of exchange and promissory notes figure so constantly in the law of contract, and are so aptly illustrative of the nature of negotiability, that we will shortly consider their principal features.

A bill of exchange usually takes the form of a written order addressed by M to X, directing X to pay a sum of money to A or order, or to A or bearer. M is then called the drawer of the bill, and by drawing it

he promises to pay the sum specified to A or any subsequent holder if X do not accept the bill or, having accepted it, fail to pay.

Until acceptance, X, upon whom the bill has been drawn, is called the drawee. When X has assented to pay the sum specified, he is said to become the acceptor. [Such assent is usually expressed by writing the word "accepted," with the date and the name of the acceptor across the face of the bill; but the name of the acceptor alone is sufficient. In the absence of statutory regulations, an oral acceptance is valid; (a) and a parol promise to pay the bill will be treated as an acceptance. (b) By accepting the bill the acceptor becomes primarily liable, and will be held for its payment even if he has no funds of the drawer in his hands. (c)]

If the bill be payable to A or bearer, it may be transferred from one holder to another by mere delivery: if it is payable to A or order, it may be transferred by indorsement.

Indorsement is an order, written upon the bill, and signed by A, in favor of D. Its effect is to assign to D the right to demand acceptance or payment of the bill from X when due, and in the event of default by X to demand it of M, the original drawer, or of A, against whom he has a concurrent remedy as being to all intents a new drawer of the bill.

If the indorsement be simply to D, or to D or order, specially, the bill may be assigned by D to whomsoever he will in the same manner as it was assigned to him.

If the indorsement be the mere signature of A, it in blank is indorsed in blank, and the bill then becomes payable to bearer, that is, assignable by delivery.

A has given his *order* and that addressed to no *214

- (a) [*Leonard v. Mason*, 1 Wend. 522.]
- (b) [*Jones v. State Bk. of Iowa*, 84 Ill. 318.]
- (c) [*Cronise v. Kellogg*, 20 Ill. 11.]

one in particular; the bill is in fact indorsed over to any one who becomes possessed of it.

A promissory note.

A promissory note is a promise in writing made by X to A, that he will pay a specified sum at a specified time or on demand to A or order, or to A or bearer. X, the maker of the note, is in a similar position to that of an acceptor of a bill of exchange; and the rules as to assignment by delivery or indorsement are similar to those relating to a bill of exchange.

Assignability distinguished from negotiability.

We may now endeavor to distinguish, by illustration from the case of instruments of this nature, the difference between *assignability* and *negotiability*.

Let us suppose that X makes a promissory note payable to A or order, and that A indorses it over to D. D calls upon X to pay the value of the note, and sues him upon default.

In the case of an ordinary contract, D would, at the least, be called upon to show that he had given consideration to A for the assignment; that notice of the assignment had been given by him to X; and he would then have no better title than A.

Consideration presumed.
Notice not needed.

The assignee may have a better title than the assignor.

In the case of negotiable instruments Consideration is presumed to have been given until the contrary is shown, and notice of assignment is not required.

But suppose it turn out that the note was given by X to A for a gambling debt, or was obtained from him by fraud. The position of D is then modified to this extent. (a)

As between A and X the note would be void or voidable according to the nature of the transaction, but this does not affect the rights of a *bona fide* holder for value, that is, a person who gave consideration for the note, and had no notice of the vitiating elements in its origin. The presumptions of law under these cir-

(a) [See *Peters v. Ballistier*, 3 Pick. 495; *Conard v. Atlantic Ins. Co.*, 1 Pet. 396, and note A page 180.]

cumstances are, (1) that D did not give value for the bill, but (2) that he was ignorant of the fraud or illegality, for fraud or participation in an illegal act, is never presumed. It will be for D to show *215 that he gave value for the bill, but for X to show that D knew that the bill was tainted in its origin. If D proves his point and X fails to prove his, ^{Byles on Bills, ed. 12, p. 122.} then D can recover in spite of the defective title of A his assignor.

The case of *Crouch v. Credit Foncier of England* L. R. 8 Q. B. ³⁷⁴ furnishes an illustration both of the nature of negotiability and the limits within the creation of negotiable instruments is permissible.

A debenture assignable under the Companies Act and expressed to be payable to the bearer was stolen; the thief sold it to the plaintiff, and he sued the Company for non-payment; the jury found that he was a *bona fide* holder for value of the debenture, but the Court held that he could not recover, because, in spite of the wording of the debenture, it was an instrument under seal, and therefore could not be, what it purported to be, a negotiable instrument assignable by delivery. The plaintiff therefore suffered for the defective title of his assignor. (a)

Had the debenture been a negotiable instrument, the plaintiff could have recovered; for, as BLACKBURN, J., said, in speaking of such contracts, "the person who, by a genuine indorsement, or where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it." ^{L. R. 8 Q. B. p. 382.}

But the case further goes to show that a man can-

(a) [In a number of the States the defense of want or failure of consideration is allowed by statute in an action upon a sealed instrument for the payment of money or property.]

not, by merely making an instrument payable to bearer, make it thereby negotiable, if the custom of the law merchant does not recognize it as such; or if, being so recognized by the custom of merchants, the character of the instrument preclude its negotiability. For it had been the custom of merchants to treat these debentures as assignable by delivery; yet when one of them came before the Courts it was *216 at once denied the incidents of negotiability as incompatible with its character of an instrument under seal.

Bill of lading.

What is it.

**What rights its assign-
ment con-
fers.**

**S M. & W.
§39.**

It would not be desirable to go further into the subject of negotiable instruments than is necessary to exhibit the essential features of negotiability. We may however notice the character of "bills of lading," as possessing some peculiar marks. A bill of lading is called "a document of title," "a symbol of property," and the meaning of these phrases is this: The bill of lading is a receipt by the master of a ship for goods bailed to him for delivery to X or his assigns. Of this receipt three copies are made, each signed by the master. One is kept by the consignor of the goods, one by the master of the ship, and one is forwarded to X, the consignee, who on receipt of it acquires a property in the goods which can only be defeated by the exercise of the vendor's equitable right of stoppage *in transitu*.¹

The assignment of the bill of lading by indorsement by the consignee to a holder for value gives to that holder a better right than the consignee himself possessed. He has a title to the goods which overrides

¹ Stoppage *in transitu* is the right of the unpaid vendor upon learning the insolvency of the buyer, to retake the goods before they reach the buyer's possession. For the history of this right the reader is referred to the judgment of Lord ABINGER, C. B., in *Gibson v. Caruthers*, for its application to Benjamin on Sales, bk. v. part 1.

the vendor's right of stoppage *in transitu*, and gives Lickbarrow him a claim to them in spite of the insolvency of the ^{v. Mason, 2} Sm. L. C. consignee and the consequent loss of the price of his goods. ^{825.}

His right, however, which in this respect is based upon the law merchant, is a right of property only. ^{By law merchant, prop-} The assignment of the bill of lading gives a right to rights ^{rietary} the goods. It did not at Common Law give any right to sue on the contract expressed in the bill of lading.

As regards the negotiability of a bill of lading, it differs in some important respects ^{*217} from the instruments with which we have just been dealing.

Its assignment transfers rights *in rem*, rights to specific goods, and these to a certain extent wider than those possessed by the assignor; therein it differs from negotiable instruments which only confer rights *in personam*.

But though the assignee is relieved from one of the liabilities of the assignor, he does not acquire proprietary rights independently of his assignor's title: a bill of lading stolen, or transferred without the authority of the person really entitled, gives no rights even to a ^{pendent of assignor's title.} *bona fide* indorsee. And again, the contractual rights conferred by statute are expressly conferred subject to equities. A bill of lading then may be called a contract assignable without notice, partaking in some respects of the character of conveyance, inasmuch as it gives a title to property, but incapable of giving a better title, whether proprietary or contractual, than is possessed by the assignor, subject always to this exception, that one who takes from an assignor with a good title is relieved from liability to the vendor's right of stoppage *in transitu* which might have been exercised against the original consignee.

§ 2. Assignment of contractual rights and liabilities by operation of law.

We have hitherto dealt with the mode in which the parties to a contract may by their own acts assign to others the benefits or the liabilities of the contract. There are, however, certain circumstances in which rules of law operate so as to transfer to one person the rights or the liabilities of another.

Assignment
of interests
in land.

If A by purchase or lease acquire an interest *218 in land of M upon certain terms which bind them by contractual obligations in respect of their several interests, the assignment by either party of his interest to X will within certain limits operate as a transfer to X of those obligations. Marriage, again transfers to the husband the rights and liabilities of the wife, not absolutely, but conditionally.

Marriage.

Representation, whether in the case of death or bankruptcy, operates to confer in the one case upon the executors or administrators of the deceased, in the other upon the assignees of the bankrupt, his rights and liabilities; but here the assignment of contractual obligations is merely a mechanical contrivance for continuing up to a certain point and for certain purposes the legal existence of the deceased or the bankrupt. They to whom the contract is assigned take no benefit by it, nor are they personally losers by the enforcement of it against them. They merely represent the original contracting party to the extent of his estate and no more.

Representation.

Assignment of obligations upon the transfer of interests in land.

a. Covenants affecting leasehold interests.

Covenants
affecting

At Common Law these are said to "run with the land and not with the reversion," that is to say they

pass upon an assignment of a lease, but not upon an leasehold assignment of the reversion. If the lessee assigned his lease, the man to whom he assigned it would be bound to the landlord by the same liabilities and entitled to the same rights as his assignor, to this extent:

(1) Covenants in a lease which "touch and concern if they concern the thing demised" pass to the assignee of the lessee whether or no they are expressed to have been made with the lessee "and his assigns." Such are covenants to repair, or to leave in good repair, or to deal with the land in any specified manner.

(2) Covenants in a lease, which relate to something not in existence at the time of the lease, are said to bind the assigns only if named, that is to say if the covenant be expressed as made with heirs and assigns. But although this rule is laid down in the leading case upon the subject, it has been so unfavorably commented upon in a modern decision that its validity is extremely questionable.

(3) In any case the assignee of the lessee does not acquire benefit or liability from merely personal or collateral covenants made between his assignor and his landlord. X the lessee covenanted to use his premises as a public house. A the lessor covenanted not to build or keep any house for the sale of beer or spirits within half a mile of the demised premises. X signed his lease to M. It was held that the benefit of A's covenant did not pass to M.

The reversioner or landlord does not, at Common Law, by the assignment of his interest in the land convey his rights and liabilities to the assignee.

It was not till 32 Hen. VIII. c. 34 that the law in this respect was changed, a change probably due to the dissolution of the monasteries. By that act the assignee of the reversion is enabled to take the benefits,

and also incurs the liabilities, of covenants entered into with his assignor: and it has been settled that the rules as to the connection of the covenants with the thing demised apply to such as run with the reversion equally with those that run with the land. The act only applies to leases under seal, but in the case of leases from year to year, payment of rent and the acceptance of it is held to be evidence from which a jury may infer "a consent to go on, on the same terms as before."

**Sm L. C. 1
63.**

**Per Willes,
J., Cornish
v. Stubbs, L.
R. 5 C. P.
839.**

**Covenants
with owner.**

**Dicey, Par-
ties to Ac-
tions, 120-5.**

**Covenants
by owner.**

**Stockport
Waterworks
Co. v. Potter,
3 H. & C.
800.**

**2 Mylne &
Keen, 517.**

At Common Law, covenants entered into *with* the owner of land, that is to say, promises under seal made *to* the owner of land, and for his benefit, pass *220 to his assignees provided they touch and concern the thing demised and are not merely personal.

X a vendor of land covenants with A the purchaser that he has a good right to convey the land; the benefit of such a covenant would pass from A to his assignees. It would be otherwise if a covenant were introduced into the conveyance relating to some matter purely personal between A and X.

On the other hand, covenants entered into *by* the owner of land which restrict his enjoyment of the land do not at Common Law bind his assignees, except he thereby create certain well known interests, such as easements and profits, recognized by law.

If a man endeavor to create restrictions on his land which are not included in the circle of rights *in re aliena* known to the Common Law, he cannot affix those rights to the land so as to bind subsequent owners. The cases which deal with attempts to create "an easement in gross" illustrate this proposition, the principle of which is thus enunciated by Lord BROUGHAM in *Keppel v. Baily*: "It must not be supposed that incidents of a novel kind can be devised and attached

to property, at the fancy or caprice of the owner. . . . Common
Great detriment would arise and much confusion of
rights, if parties were allowed to invent new modes of
holding and enjoying real property, and to impress
upon their lands and tenements a peculiar character,
which should follow them into all lands, however
remote."

But Courts of Equity have established a class of Equitable exceptions to this general rule, and although these have been mainly confined to covenants in the case of land covenants sold for building purposes, it is difficult to see what limitations can be introduced to the principle on which they are enforced. The view taken by the Courts of Equity may be thus illustrated: A sells land to X and covenants that he, A, being possessed of adjoining land, will never use it otherwise than in a particular way. A sells his land to M with notice of the covenant, and M's enjoyment of the land is then limited by the terms of the covenant. The principle is thus stated by Lord COTTFENHAM: "That this Court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed.... It is said that the covenant, being one which does not run with the land, this Court cannot enforce it; but the question is *not whether the covenant runs with the land, but whether a party shall be permitted to use his land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.*" *Tulk v. Moxhay*, 2 Ph. 774.

Assignment of contractual obligation upon marriage.

When a woman marries, having bound herself by contract while *feme sole*, and being entitled thereby to benefits, or subject to liabilities, the effect of her marriage is to disable her from acquiring the benefits of *dum sola*.
Leake, pp. 1238-1249.
Contracts of married woman.

such contracts and to vest them conditionally in her husband; to protect her from the liabilities of such contracts and pass them, with some limitations, to her husband. She is disabled from acquiring the benefit of her contracts, for if she sue alone upon contracts made by her before marriage, she may be met by an application to the summary jurisdiction of the High Court.

Husband's rights,

The husband takes the benefit of contracts made by the wife *dum sola*, if he does any act which amounts to a *reduction into possession* of the *chose in action*. He does this, in the case of a contract executed on the part of the wife, by receiving or authorizing another to receive payments due in respect of such contracts. He may do this also by suing jointly with the wife for whatsoever may be due to her upon her contracts. Whatever is thus obtained passes absolutely to the husband, like all other personal property of which the wife was previously possessed. If the husband do not during the coverture reduce into possession the *222 *chooses in action* of the wife, they survive to her if he die first, or pass to her representatives if she die in his lifetime.

Richards v.
Richards, 3
B. & Ad. 453.
Fleet v. Per-
rin, L. R. 4
Q. B. 500.

and liabilities.

The husband acquires the liabilities of the wife to this extent; at Common Law he was liable to be sued jointly with his wife upon any contracts made by her before marriage. (a)

Assignment of contractual obligation by death.

Represent-
tives acquire
all contract-
ual rights
which affect
personal
estate,

Death passes to the executors or administrators of the deceased all his personal estate, all rights of action which would affect the personal estate, and all liabilities

(a) [The rules of the common law upon the subject of the respective rights and liabilities of husband and wife have been modified so variously in the different States by statute that we can only refer the student to those statutes for the law in any particular State.]

ties which are chargeable upon it. Thus covenants which are attached to leasehold estate pass, as to benefit and liability, with the personality to the executor or administrator, while covenants affecting freehold, as covenants for title in a conveyance of freehold property, pass to the heir or devisee of the realty.

The rights and liabilities of the executors and administrators are further limited in this way, that performance of such contracts as depend upon the personal services or skill of the deceased cannot be demanded of his executors, nor can they insist upon offering such performance. Contracts of personal service then expire with either of the parties to them: an apprenticeship contract is thus terminated by the death of the master, and no claim to the services of the apprentice survives to the executor. [White's Executors v. Commonwealth, 89 Pa. St. 167.]

In like manner a breach of contract which involves a purely personal loss does not confer a right of action upon executors. In *Chamberlain v. Williamson*, an executor sued for a breach of promise to marry the deceased, the promise having been broken and a right of action having accrued in the lifetime of the testatrix. But the Court held that such an action could not be brought by representatives of a deceased person, inasmuch as it did not clearly appear that the breach of contract had resulted in damage to the personal estate. "Although marriage may be regarded as a temporal advantage to the party as far as respects personal comfort, still it cannot be considered as an increase of the transmissible personal estate."

Assignment of contractual obligation by bankruptcy.

The Bankruptcy Act of 1869 provides a machinery whereby the creditors in the case of bankruptcy or liquidation by arrangement may appoint a trustee of the property of the bankrupt for the purpose of get-

Trustee's or
Assignee's
powers:

Rogers v.
Spence, 18
M. & W. at
p. 580.

ting in and dividing the property for the benefit of the creditors. Such a trustee acquires "not only what may in strictness be called the property and debts of the bankrupt, but also those rights of action to which he was entitled for the purpose of recovering in specie real or personal property, or damages in respect of that which has been unlawfully diminished in value or taken from him." The trustee thus acquires, like the representatives of a deceased person, rights to the performance of executory contracts and rights of action for contracts broken.

their extent, The trustee of the bankrupt acquires in a fuller and more independent manner than the personal representatives, the rights of the person whose legal character he for the time assumes. In some ways he acquires a wider power than the bankrupt would have possessed in respect of his obligation. He takes all the property, real as well as personal, of the bankrupt, and obligations in respect of each; and, as his duty is not

merely to represent the bankrupt, but to represent him with special reference to the interest of his creditors, he is able to disclaim and

32 & 33 Vict. so discharge such executory contracts as he thinks will c. 71, s. 23. not be beneficial to the estate.

and limits. But, like the representative of a deceased person, he Drake v. is excluded from suing for "personal injuries arising Beckham, out of breaches of contract, such as contracts to cure 819. [Smith or to marry.] v. Sherman, 234 4 Cush. 408.

PART IV.

#225

THE INTERPRETATION OF CONTRACT.

AFTER considering the elements necessary to the Interpretation of con-formation of a contract, and the operation of a contract as regards those who are primarily interested under it, and those to whom interests in it may be assigned, it seems that the next point to be treated is the mode in which a contract is dealt with when it comes before the Courts in litigation. In considering In what the interpretation of contract we require to know how subject consists its terms are proved; how far, when proved to exist in writing, they can be modified by evidence extrinsic to that which is written; what rules are adopted for construing the meaning of the terms when fully before the Court.

The subject then divides itself into rules relating to Rules relating to evidence and rules relating to construction. Under (1) to evidence, and the first head we have to consider the sources to which (2) to construction. we may go for the purpose of ascertaining the expression by parties of their common intention. Under the second we have to consider the rules which exist for construing that intention from expressions ascertained to have been used.

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CHAPTER I.

RULES RELATING TO EVIDENCE.

Provinces of Court and Jury. If a dispute should arise as to the terms of a contract made by word of mouth, it is necessary in the first instance to ascertain what was said, and the circumstances under which the supposed contract was formed. These would be questions of fact to be determined by a jury. When a jury has found, as a matter of fact, what the parties said, and that they intended to enter into a contract, it is for the Court to say whether what they have said amounts to a contract, and, if so, what its effect may be. When a man is proved to have made a contract by word of mouth upon certain terms, he cannot be heard to allege that he did not mean what he said.

See p. 125.

The same rule practically applies to contracts made in writing. Where men have put into writing any portion of their terms of agreement they cannot alter by parol evidence that which they have written. When the writing purports to be the whole of the agreement between the parties, it can neither be added to nor varied by parol evidence.

Why oral contracts need not be discussed.

We may, as regards rules of evidence, dismiss purely oral contracts from our consideration. For the proof of a contract made by word of mouth is a part of the general law of evidence; the question whether what was proved to have been said amounts to a valid contract is a question to be answered by reference to the formation of contract; the interpretation of such a con-

tract when proved to have been made may be *227
dealt with presently under the head of rules of
construction.

We will confine our consideration of rules relating Three mat-
to evidence to their effect upon written contracts under ters of
seal; and we may say that admissible evidence extrinsic inquiry.
to such contracts falls under three heads.

(1) Evidence as to the fact that there is a document 1. Proof of
purporting to be a contract, or part of a contract. existence of
document;

(2) Evidence that the professed contract is in truth 2. Of fact of
what it professes to be. It may lack some element agreement;
necessary to the formation of contract, or be subject
to some parol condition upon which its existence as a
contract depends.

(3) Evidence as to the terms of the contract. These 3. Of terms
may require illustration which necessitates some ex- of contract.
trinsic evidence; or they may be ambiguous and then
may be in like manner explained; or they may com-
prise, unexpressed, a usage the nature and effect of
which has to be proved.

We are thus obliged to consider (1) evidence as to
the existence of a document, (2) evidence that the doc-
ument is a contract, (3) evidence as to its terms.

Before going further, we should note that there is Difference
this difference between contracts under seal and writ- between
ten contracts, a difference suggested by what has been formal and
said before. A contract under seal is a formal con- tract.
tract, deriving its validity from the form of the instru- p. 39.
ment in which it finds expression: therefore if the
instrument is proved the contract is proved, unless it In the first
can be shown to have been executed under circum- the instru-
stances which preclude the formation of a contract, or contract.
to have been delivered under conditions which have
remained unfulfilled, so that the deed is no more than
an escrow.

But "a written contract not under seal is not the Wake v.
contract itself, but only evidence, the record of the con- Harrop, 6 H.
& N. 775.

tract." Even where statutory requirements for writing exist, as under 29 Car. II. c. 3, § 4, the writing is no more than evidentiary of a previous or contem-

In the second the writing is only evidence of the contract.

*228 poraneous agreement. A written offer containing all the terms of the contract signed by A and accepted by performance on the part of B, is enough to enable B to sue A under that section. And where there is no such necessity for writing, it is optional to the parties to express their agreement by word of mouth, by action or by writing, or partly by one, and partly by another of these processes.

It is always possible therefore that a simple contract may have to be sought for in the words and acts, as well as in the writing of the contracting parties. But in so far as they have reduced their meaning to writing, they cannot adduce evidence in contradiction or alteration of it. "They put on paper what is to bind them, and so make the written document conclusive evidence against them."

*Wake v.
Harrop, 6 H.
& N. 775.
[Lewis v.
Gray, 1
Mass. 297.]*

§ 1. *Proof of Document.*

We now come to the first heading: to the proof of the document which purports to be the contract, or to be a memorandum of its terms.

Proof of
contract
under seal.

Ante, p. 37.

Of simple
contract.

A contract under seal is proved by evidence of the sealing and delivery. [In the absence of statutory provisions it is] necessary to call one of the attesting witnesses where a contract under seal is attested. A warrant of attorney and a *cognovit* afford instances of instruments to which attestation is necessary.

The mode of proof of a simple contract is by evidence of the signature of the parties if it be signed by them, or by evidence that it is in fact a written exposition of the contract, or of so much of it as *229 is in writing.¹ And oral evidence must of

¹ As a matter of practice, written contracts are commonly admitted by the parties, either upon the pleadings, or upon notice

course supplement the writing where the writing only constitutes a part of the contract. For instance: A in Oxford writes to X in London, "I will give £50 for your horse; if you accept send it by next train to Oxford. (Signed) AB." To prove the conclusion of the contract it would be necessary to prove the despatch of the horse. And so if A puts the terms of an agreement into a written offer which X accepts by word of mouth; or if, where no writing is necessary, he puts a part of the terms into writing and arranges the rest by parol with X, oral evidence must be given in both these cases to show that the contract was concluded upon those terms by the acceptance of X. *Harris v. Rickett, 4 H. & N. 1.*

So too where a contract consists of several documents, but their connection does not appear from the contents of the documents, oral evidence may be given to connect them one with another. This last rule does not apply to contracts required to be in writing under 29 Car. II., c. 3, § 4. There the connection of the documents must need no oral evidence to establish its existence, as is apparent from the case of *Boydell v. Ante*, p. 50. *Drummond*. But that case was distinguished from ordinary simple contracts in writing in a recent judgments in the Queen's Bench Division of the High Court. "That case," (*Boydell v. Drummond*) said BRETT, J., "was decided on the Statute of Frauds. The ground of decision was that separate documents in writing could not be joined together to make a memorandum in writing within that statute, unless there was a sufficient reference from one writing to another contained in the documents themselves to show that they were intended to be jointly the memorandum,

being given by one party to the other to admit such a document. Or one party may call upon the other to produce certain documents, and upon his failing to do so, and upon proof having been given of the notice to produce, the party calling for the production may give secondary evidence of the contents of the document.

without being obliged to have recourse to parol evidence to show such intention; for otherwise the *230 danger from parol evidence would arise, which it was the intention of the statute to obviate. That ground of decision is applicable only when the question is, whether there is or is not a sufficient memorandum within the Statute of Frauds. It does not seem to me to be applicable to a question whether there is a sufficient policy of assurance in writing, or as to what documents form that policy. I see no reason why parol evidence should not be admitted to show what documents were intended by the parties to form an alleged contract of insurance."

*Edwards v.
Aberayr-on
Mutual In-
surance Soci-
ety, L. R. 1
Q. B. D. 587.*

There are circumstances, such as the loss or inaccessibility of the written contract, in which parol evidence of the contents of a document is allowed to be given, but these are a part of the general law of evidence. The reader is referred for a summary of the rules existing upon this subject to Sir J. Stephen's Digest of the Law of Evidence.

*Am. Ed., by
Reynolds,
Art 71.*

§ 2. Evidence as to fact of Agreement

Thus far we have dealt with the mode of bringing a document, purporting to be an agreement, or part of an agreement, before the Court. But extrinsic evidence is admissible to show that the document is not in fact a valid agreement, or that it is not the whole of an agreement.

It may be shown that incapacity of one of the parties, want of genuine consent, or illegality of object made the agreement of the parties unreal, or such as the law forbids to be carried into effect. In the case of a simple contract it may be shown, where the promise only appears in writing, that no consideration was given for the promise. Such evidence is constantly admissible to contradict the presumption of value. *B. v. Foster*. 1 C. Jolly. 1 C. M. & R. 708. given for a bill of exchange or promissory note. But

this must be distinguished from evidence which may [Stackpole v. Arnold, 11 Mass. 27.] be given as to the total failure of consideration promised, for this mode of discharge. See Part V.

Similarly in the case of a deed, where fraud *231 ch. iii. s. 2, or undue influence is alleged, the absence or inadequacy of consideration may be adduced in derogation of the deed. p. 290.

But even where none of these circumstances exist, Evidence of extrinsic evidence may be given to the effect that the document was made under conditions which show that it was not intended to be a contract. It may be proved In the case of a deed that the delivery was made subject to a condition, and that until the condition happened, the deed was never intended to be operative. Until such time as the condition is fulfilled the deed remains an *escrow*, and the terms subject to which it was delivered may be proved by oral or documentary evidence extrinsic to the sealed instrument. See p. 40.

And it may be so with a written contract. Evidence of a simple may be given to the effect that a document purporting to be a contract is not so in fact. For though apparently absolute in its terms, it may be dependent upon a condition unexpressed in the document, and the terms to which the parties actually agreed may have been that, until the condition happened, the written contract was to remain inoperative. Thus in *Pym v. 6 E. & R. Campbell* the defendants agreed to purchase from the plaintiffs a portion of the benefits to be derived from a mechanical invention made by the plaintiffs. The purchase was to be made if one X approved of the invention, but before this approval had been given they signed a memorandum of agreement on the express understanding that they did so for convenience only and that the agreement was not to bind them until the approval of one Abernethie had been intimated. Abernethie did not approve of the invention. The plaintiffs nevertheless contended that the agreement was binding and

that the verbal condition was inadmissible in evidence, because it was an attempt to introduce a new term into a written contract. But the Court held that the evidence was admissible, not to *vary a written contract*

*232 but to show that *there had never been a contract at all*. The following is the judgment of ERLE, J.:

"The point made is that this is a written agreement, absolute on the face of it, and that evidence was adduced to show it was conditional; and if that had been so it would have been wrong. But I am of opinion that the evidence showed that in fact there was never an agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and it in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol evidence: but in the present case the defense begins one step earlier: the parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defense may be set up without ground; and I agree that a jury should therefore always look on such a defense with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is, that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

Pym v.
Campbell, 6
E. & B. 374.

Evidence of
supplement-
ary terms.

Evidence too is admissible to show that a document purporting to be an agreement is only a portion of that which was, in fact, agreed upon. This is not at vari-

ance with the rules just laid down. If two parties enter into a contract, and then for certain purposes put some of its terms into writing, evidence may be given, not to vary those terms, but to show that they did not compose the entire contract. An illustration of this rule is afforded by the case of *Jervis v. Berridge*. The L. R. 8 Ch. plaintiff agreed to assign to the defendant a contract^{351.} for the purchase of lands from M: the assignment was to be made upon certain terms, but a memorandum was drawn up for the purpose of obtaining a conveyance of the lands from M to the defendant, in which, at the request of the latter, nothing was stated but the assignment, and various terms in favor of the plaintiff were omitted. The defendant obtained a conveyance of the lands and afterwards refused to fulfill the terms which were in favor of the plaintiff. The plaintiff then applied to the Court of Chancery to get the assignment set aside and a conveyance of the lands made to him. The defendant set up the memorandum from which the terms in favor of the plaintiff had been excluded, and contended that the original agreement being verbal, and so unenforceable, under 29 Car. II. c. 3, § 4, the memorandum, which complied with the terms of the statute, must prevail. But the Court held that this was not so: that the memorandum was a "mere piece of machinery per Selborne obtained by the demurring defendant as subsidiary to L. C., at p. 359. and for the purposes of the verbal and only real agreement under circumstances which would make the use of it for any purpose inconsistent with that agreement dishonest and fraudulent."

Thus we find that extrinsic evidence as to the fact **Summary.** of agreement is admissible, not only where vitiating elements are alleged to exist in the formation of the contract, but (1) where a memorandum of a contract *Pym v. Campbell, 6 E. & B. 374.* is shown to have been signed in dependence upon an unfulfilled condition, and without the *animus contra-*

hendi; and (2) where a document is shown to be only Jervis v. Ber- a part of a larger agreement of which some of the ridge, L. R. terms have been reduced to writing for the convenience of the parties. But these sets of circumstances 8 Ch. 351. come alike to the same result, that there has not been such an agreement between the parties as the document produced would appear to suggest.

§ 3. Evidence as to the terms of the Contract.

Evidence as to terms. We now come to extrinsic evidence as affecting the terms of a contract, and here the admissibility of such extrinsic evidence is narrowed to a small com-

General rule. *234 pass: for "according to the general law of Per Black- England the written record of a contract must burn, J., in not be varied, or added to by verbal evidence of what Burges v. Wickham, 3 was the intention of the parties."

B. & S. 669. We find exceptions to this rule—
Exceptions.

(a) in cases where one of the parties gives a promise collateral to the main agreement in consideration of the other concluding that agreement;

(b) in cases where explanation of the terms of the contract is required;

(c) in the introduction of usages into the contract;

(d) in the application by equity of its peculiar remedies in the case of mistake.

Collateral terms. (a) Evidence may be given of a verbal agreement collateral to the contract proved, and, in fact, making it subject to a term unexpressed in its contents. Such a term however can only be enforced if it be not contrary to the tenor of the written agreement. Thus where a farmer executed a lease upon the promise of the lessor that the game upon the land should be killed down, it was held that he was entitled to compensation for damage done to his crops by a breach of such a verbal promise though no reference to it appeared in the terms of the lease. MELLISH, L. J., in giving judg-

ment said, "No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to introduce additional terms into the agreement; but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself. I quite agree that an agreement of that kind is to be rather closely watched, and that we should not admit it without seeing clearly that it is substantially proved."

Erskine v. Adeane, L.R. 8 Ch. at p. 766. [Fusting v. Sullivan, 41 Md. 162.]

(b) Explanation of terms may merely amount to evidence of the identity of the parties to the contract, as where two persons have the same name, or where an agent has contracted in his own name but on the understanding that he does so as an agent. Or it may be a description of the subject-matter of the contract, as in a case in which A agreed to buy of X certain wool which was described as "your wool," and the right of X to bring evidence as to the quality and quantity of the wool was disputed. The Court held that it was admissible, and ERLE, J., thus stated the grounds of decision:

"I am of opinion that the plaintiffs are entitled to succeed. I assume that they must prove a written contract, and that that contract must contain all the material terms. The contract here is most explicit: it is to purchase of the plaintiffs 'your wool,' at 16s. a stone, to be delivered at Liverpool. The oral evidence is no doubt admissible to identify the subject-matter of the contract, and to show what 'your wool' really was. The judge who has to construe the written document, cannot have judicial knowledge of the subject-matter; and evidence has been invariably allowed to identify it."

Macdonald v. Longbottom, 1 E. & E. 977.

to show application of phrases.

Explanation of terms may be an explanation of some word not describing the subject-matter of the contract, but the amount and character of the responsibility which one of the parties takes upon himself as to the conditions of the contract. Where a vessel is warranted "seaworthy," a house promised to be kept in "tenantable" repair, a thing undertaken to be done in a "reasonable" manner, evidence is admissible to show the application of these phrases to the subject-matter of the contract, and so to ascertain the intention of the parties.

8 R. & S. 609. In *Burges v. Wickham*, a vessel called the Ganges, intended for river navigation upon the Indus, was sent upon the ocean voyage to India, having first been temporarily strengthened so as to be fit to meet the perils

of such a voyage. Her owner insured her, and
***236** in every policy of marine insurance there is an implied warranty by the insured that the vessel is "seaworthy." The Ganges was not seaworthy in the sense in which that term would be ordinarily applied to an ocean going vessel, but her condition was made known to the underwriters, and though her adventure was more dangerous than an ordinary voyage to India, there appeared to be a reasonable probability of its being brought to a safe ending. At any rate, the underwriters took the risk in full knowledge of the facts. The Ganges was lost, and the owner sued the underwriters; they defended the action on the ground that the vessel was unseaworthy in the ordinary sense of the word as applied to an ocean voyage, and maintained that evidence could not be admitted to show that, with reference to this particular vessel and voyage, the term was understood in a modified sense. It was held that such evidence was admissible. The grounds on which it was admissible are stated by BLACKBURN, J., in a judgment which explains the rule with the utmost clearness:

"It is always permitted to give extrinsic evidence to apply a written contract, and show what was the subject matter to which it refers. When the stipulations in the contract are expressed in terms which are to be understood, as logicians say, not *simpliciter*, *sed secundem quid*, the extent and the obligation cast upon the party may vary greatly according to what the parol evidence shows the subject matter to be; but this does not contradict or vary the contract. For example, in a demise of a house with a covenant to keep it in tenantable repair, it is legitimate to enquire whether the house be an old one in St. Giles' or a new palace in Grosvenor-square, for the purpose of ascertaining whether the tenant has complied with his covenant, for that which would be repair in a house of the one class is not so when applied to a house of the other (see *Payne v. Haines*). So, suppose a sale of a horse warranted to go well in harness; the qualities necessary to constitute a good goer in harness would be different in a pony fit to draw a lady's carriage or a dray horse; or in a lease of Whiteacre for a year with an express contract to cultivate it in a proper manner, the quantity of labor and manure which the tenant would have to bestow must be different according as Whiteacre consists of hop gardens or meadows. In each of these cases you legitimately inquire what is the subject matter of the contract, and then the terms of the stipulation are to be understood, not *simpliciter*, but *secundem quid*. The two last instances I have supposed are not, as far as I know, decided cases; but I give them to explain my meaning as examples of a general rule. Now, according to the view already expressed, seaworthiness is a term relative to the nature of the adventure, it is to be understood, not *simpliciter*, but *secundem quid*."

Cases of the sort we have just described are called cases of *latent* ambiguity, and are sometimes distin-

Burges v. Wickham, 3 B. & S. 690.
[See Gray v. Harper, 1 Story, 574.]

guished from *patent* ambiguities, where words are omitted, or contradict one another; in such cases *Sanderson v. planatory evidence is not admissible. Thus, where a Piper,⁵ bill of exchange was drawn for "two hundred pounds" Bing. N. C. 425. [See but the figures at the top were "245," evidence was Worthington v. Hylcer,⁴ not admitted to show that the bill was intended to be Mass. 205.] drawn for the larger amount.*

Evidence of usage. (c) Evidence is admissible of the usage of a trade or a locality which may add a term to a contract, or may attach a special and sometimes non-natural meaning to one of its terms. As an instance of a usage which annexes a term to a contract we may cite the warranty of seaworthiness just mentioned, which by custom is always taken to be included in the contract of marine insurance, though not specially mentioned.

Usage to annex incidents. Similarly in the case of agricultural customs a usage that the tenant, quitting his farm at Candlemas or Christmas, was entitled to reap the corn sown the preceding autumn was held to be annexed to his lease, although the lease was under seal, and was silent on the subject.

Wigglesworth v. Dallison, 1 Sm. L. C. 598. [See Western Union R. Co. v. Smith, 75 Ill. 496.] *238 The principle on which such usages are annexed is stated by PARKE, B., in *Hutton v. Warren*, to rest on the "presumption that in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages."

1 M. & W. 466. At p. 475. And see judgment of Blackburn, J., in Mollett v. Robinson, L. R. 7 C. P. at p. 111. The admissibility of evidence of usage to explain phrases in contracts, whether commercial, agricultural or otherwise subject to known customs, might be exemplified by reference to very numerous cases. The principle on which such explanation is admitted has been stated to be, "that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. In such cases the evi-

dence neither adds to, nor qualifies, nor contradicts the Brown v. existing contract; it only ascertains it by expounding ^{Byrne, 3 E.} & B. 716. the language."

Thus in commercial contracts in the case of charter parties in which the days allowed for unloading the ship "are to commence running 'on arrival' at the ship's port of discharge, evidence may be given to show what is commonly understood to be the port. Some ports are of large area, and by custom 'arrival' is understood to mean arriving at a particular spot in the port." ^{Per Cole-ridge, C. J., Norden Steam Co. v. Dempsey, L. R. 1 C. P. D. 658.}

In like manner a covenant by the lessee of a rabbit warren that he would leave 10,000 rabbits on the Warren was explained by evidence of a usage of the locality that 1,000 meant 1,200. ^{Smith v. Wilson, 3 B. & Ad. 728.}

Closely connected with the principal that usage may explain phrases is the admissibility of skilled evidence to explain terms of art or technical phrases when used in documents. ^{Hills v. Evans, 31 L. J. Ch. 457.}

In order to affect a contract a usage must be consistent with rules of law. "A universal usage cannot be set up against the general law." And it must also be consistent with the terms of the contract, for it is optional to the parties to exclude the usage, if they think fit, and to frame their contract so as to be repugnant to its operation. ^{Per Erie, C. J., in Meyer v. Drener, 16 C. B. N. S. 646. Conditions under which usage operates.} *239

(d) In the admission of extrinsic evidence goes further than Common Law, and, from the various processes by which it can deal with a contract, is enabled to admit degrees of such evidence according to the circumstances of the case, the negligence or the bad faith of the parties.

A offered to X several plots of land for a round sum; immediately after he had dispatched his offer he discovered that by a mistake in adding up the prices of the plots he had offered his land for a lower total sum than he intended. He informed X of the mis-

**Webster v.
Cecil, 30
Beav. 62.**

[**McLennan
v. Johnson,
60 Ill. 306.**]

**Rectifica-
tion of doc-
uments.**

**Earl Beau-
champ v.
Winn, L. R.
6 H. L. at p.
232.**

**Murray v.
Parker, 19
Bead 805.
[Sargent v.
Adams, 3
Gray. 72.]**

**L. R. 8 Eq.
375.**

**4 D. & J.
250.**

**[Emory v.
Mohler, 69
Ill. 221.]**

**See case
cited in Pol-
lock, 452.**

Correction of be regarded as having something of the character of

take without delay, but not before X had concluded the contract by acceptance. Evidence was admitted to show that A's offer was made by inadvertance, and specific performance of the contract was refused. X was left to such remedy by way of damages as the Common Law Courts might give him.

In this case evidence extrinsic to the contract was admitted to show that one of the parties was disentitled, by the mistake of the other, to specific performance. But where a parol contract has been reduced to writing, or where a contract for a lease or sale of lands has been performed by the execution of a lease or conveyance, Equity will still admit evidence to show that a term of the contract is not the real agreement of the parties. And it will admit such evidence for two purposes and under two sets of circumstances.

Where a contract has been reduced into writing, or a deed executed, in pursuance of a previous agreement, and the writing or deed, owing to mutual mistake, fails to express the intention of the parties, Equity will rectify the written instrument in accordance with their true intent. This may be done even though the parties can no longer be restored to the position which they occupied at the time when the contract was made.

***240** Should the original agreement be ambiguous in its terms, extrinsic, and, if necessary, parol evidence will be admitted to ascertain the true intent of the parties.

But there must have been a genuine agreement (*Mackenzie v. Coulson*): its terms must have been expressed under mutual mistake (*Fowler v. Fowler*): and the oral evidence, if the only evidence, must be uncontradicted.

Where mistake is not mutual, Equity will only admit extrinsic evidence in certain cases which appear to

Fraud, and will admit it for the purpose of offering to mistake the party seeking to profit by the mistake an option of which is not mutual. abiding by a corrected contract or having the contract annulled.

Instances of such cases are *Garrard v. Frankel*, 80 Beav. 445. cited above, or *Harris v. Pepperell*, in which the See p. 127. mistake of the one party was caused by the other, though not with any fraudulent intent, and known Harris v. to him before his position had been affected by the Pepperell. L. R. 5 Eq. 1. contract.

It would seem that, in such cases, Equity will not use its corrective powers unless the parties can be placed in the same position as if the contract had not been made.

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CHAPTER II.

RULES RELATING TO CONSTRUCTION.

§ 1. *General Rules.*

SO FAR we have dealt with the admissibility of evidence in relation to contracts in writing. We now come to deal with the rules of construction which govern the interpretation of the contract as it is found to have been made between the parties.

(1) Words to be understood in their plain meaning.

(1) The first rule to lay down is that words are to be understood in their plain and literal meaning. And this rule is followed even though its consequences may not have been in the contemplation of the parties, subject always to admissible evidence being adduced of a usage varying the usual meaning of the words, and subject to the next rule which we proceed to state.

Mallan v.
May, 18 M.
& W. 517.
[Ricker v.
Fairbanks,
40 Me. 43.]
Ford v.
Beech, 11 Q.
B. 886.

[Cleveland v.
Smith, ²
Story, 280.]

(2) Subject to inference of intention from the whole document.

(2) "An agreement ought to receive that construction which will best effectuate the intention of the parties to be collected *from the whole of the agreement.*" "Greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent."

These two rules would seem sometimes to be in conflict, but they come substantially to this; men will be taken to have meant precisely what they have said, unless, from the whole tenor of the instrument, a definite meaning can be collected which gives a broader interpretation to specific words than their literal mean-

ing would bear. The Courts will not make ^{*242} an agreement for the parties, but will ascertain what their agreement was; if not by its general purport, then by the literal meaning of its words. Sub- General subsidiary to these main rules there are various others, all ^{purport of} ^{rules of} tending to the same end, the affecting of the intention construction. of the parties so far as it can be discerned.

Thus Courts, both of Law and Equity, will correct obvious mistakes in writing and grammar.

They will restrain the meaning of general words by more specific and particular descriptions of the subject matter to which they are to apply.

They assign to words susceptible of two meanings that which will make the instrument valid. Thus in *Haigh v. Brooks*, a document was expressed to be given to the plaintiffs "in consideration of your *being*" ^{>26.} [Thirall v. Newall, 19 in advance" to J. S. It was argued that this showed Vt. 202.] a past consideration, but the Court held that the words might mean a prospective advance, and be equivalent to "in consideration of your *becoming* in advance," or "on condition of your being in advance."

They will construe words most strongly against the party who used them. The principle on which this rule is based seems to be that a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the Court will adopt a construction which they would mean another thing, more to his advantage. ^{Fowkes v. Manchester Assurance Association, 3 B. & S. at p. 929.} ^[Deblois v. Earle, 7 R. I. 26.]

§ 2. Rules of Law and Equity as to Time and Penalties.

There are two points of construction on which law and equity differ. These have reference to terms respecting *time* and *penalties*.

At law, "*time* was always of the essence of the contract." If A made a promise to X whereby he under-

244 INTERPRETATION OF CONTRACT. Part IV.

sence of the
contract at
Common
Law.

Not so in
Equity.

Lennon v.
Napper,³
Sch. & L.
684.
[Voorhees v.
DeMyer, 2
Barb. 37.]

Penalties.

Penalty and
liquidated
damages.

Bullen &
Lenke, Prec.
of Plead-
ings, 188.

*243 took to do a certain thing by a certain day in consideration that X would thereupon do something for him, X was discharged from his promise if A had not fulfilled his by the date named in the contract. Equity, however, looked further into the intention of the parties, so as to ascertain whether in fact the performance of the contract was meant to depend upon A's promise being fulfilled to the day, or whether a day was named in order to secure performance within a reasonable time. If the latter was found to be the intention of the parties, equity would not refuse to A the enforcement of X's promise if his own was performed within a reasonable time. It is nevertheless open to the parties to make time of the essence of the contract by express agreement.

Penalties have been regarded always by Courts of Equity, and for a long time past by Courts of Law, as open to questions of construction of the following character:

Where the parties affix a penalty to the non-performance of his promise by one, or each of them, they may have intended to effect either of two purposes; to assess the damages at which they rate the non-performance of the promise, or to secure its performance by the imposition of a penalty in excess of the actual loss likely to be sustained.

If the former was their intention, the sum named is recoverable as "liquidated damages."¹ If the *244 latter, the amount recoverable is limited to the loss actually sustained, in spite of the sum undertaken to be paid by the defaulter. In construing contracts in which such a term is introduced, the Courts will not be guided by the name given to the sum to be paid.

¹ Liquidated damages are "the sum agreed upon in the contract by the parties themselves as the damages of a breach of it." Unliquidated damages are such as are left to be assessed by a jury according to the loss sustained.

If it be in the nature of a penalty they will not allow it to be enforced although the parties have expressly stated that it is to be paid as liquidated damages and not as a penalty.

The leading case upon this subject is *Kemble v. Farren*, and from it the following rules may be deduced:

If the contract is for a matter of certain value and a sum is fixed to be paid on breach of it which is in excess of that value, then the sum fixed is a penalty and not liquidated damages. [Bearden v. Smith, 11 Rich. (S. C.) L. 554.]

If the contract is for a matter of uncertain value and a sum is fixed to be paid on breach of it, the sum is recoverable as liquidated damages. There is "nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree." [Per Tindal, C. J., in *Kemble v. Farren*. Chase v. Allen, 18 Gray, 42.]

If the contract contains a number of terms some of which are of a certain value and some are not, and the penalty is applied to a breach of any one of them, it is not recoverable as liquidated damages, however strongly the parties may have expressed their intention that it shall be so. [Watts v. Shepherd, 2 Ala. 425.]

Thus in *Kemble v. Farren* the defendant agreed to act at Covent Garden theater for four consecutive seasons and to conform to all the regulations of the theater, and the plaintiff promised to pay the defendant £3 6s. 8d. every night, during that time, that the theater should be open for performance, and to give him one benefit night in each season.

It was further agreed that for a breach of any term of this agreement by either party, the one in default should pay the other £1,000, "to which sum it was thereby agreed that the damages sustained by any such omission, neglect or refusal, should amount; and which sum was thereby declared

by the said parties to be *liquidated and ascertained damages and not a penalty*, or penal sum, or in the nature thereof." The defendant refused to act during the second season, the jury put the damages for his breach of contract at £750, and the plaintiff moved for a rule to raise them to £1,000.

But the Court held, that in spite of the explicit statement of the parties that the sum was not to be regarded as a penalty, it must be so regarded. If the penal clause had been limited to breaches uncertain in their nature and amount, it was thought that it might have had the effect of ascertaining the damages, for the reason above cited. "But," said TINDAL, C. J., "in the present case the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3 6s. 8d. per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as

a penalty appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement."

Kemble v.
Farren, 6
Bing, 147.
For a full
discussion of
this subject,
see Story on
Con., 5 ed.
Chap. 76.

PART V.***246****DISCHARGE OF CONTRACT.**

WE have now dealt with the elements which go to Discharge of the formation of Contract, with the operation of Contract when formed, and with its interpretation when it comes into dispute. It remains to consider the modes in which the contractual tie may be loosed, and the parties wholly freed from their rights and liabilities under the contract. And in dealing with this part of the subject it will be proper to consider, not merely the mode in which the original contract may be discharged, but, in case of its being discharged by breach, the mode in which the right of action arising thereupon may be extinguished.

The modes in which a contract may be discharged how effected would seem to be these:

(a) It may be discharged by the same process which Agreement created it, mutual agreement.

(b) It may be performed; and all the duties undertaken by either party may be thereby fulfilled, and all the rights satisfied.

(c) It may be broken; upon this a new obligation Breach connects the parties, a right of action possessed by the one against the other.

(d) It may become impossible by reason of certain Impossibility circumstances which are held to exonerate the parties from their respective obligations.

(e) It may be discharged by the operation of rules Operation of law upon certain sets of circumstances, to be here- Law. after mentioned.

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CHAPTER I.

DISCHARGE OF CONTRACT BY AGREEMENT.

Forms of discharge by agreement. We have often noted, as the essential feature of the contractual obligation, that it is the result of the voluntary act of the parties, expressed by their agreement. As it is their agreement which binds them, so by their agreement they may be loosed.

And this mode of discharge may occur in one of three forms: waiver, substituted agreement, condition subsequent.

§ 1. Waiver.

Waiver.

A contract may be discharged by express agreement that it shall no longer bind either party. This process is called a waiver, cancellation, or rescission of the contract.

Byles on Bills, 197.

An agreement of this nature is subject to the rule which governs all simple contracts, with regard to consideration. And the consideration for the promise of each party is the abandonment by the other of his rights under the contract. The rule, often stated, that "a simple contract may, *before breach*, be waived or discharged, without a deed and without consideration," must be taken to mean that, where the contract is *executory*, no further consideration is needed for an agreement to rescind, than the discharge of each party by the other from his liabilities under the contract.

Mere waiver of contractual rights invalid.

There seems to be no authority for saying that a contract, executed upon one side, can be discharged before breach, without consideration; that where A

has done all that he was bound to do and the time for X to perform his promise has not yet arrived, a bare waiver of his claim by A would be an effectual discharge to X.

In fact, English law knows nothing of the abandonment of such a claim, except by release under seal, or for consideration. The plea of "waiver" under the old system of pleading was couched in the form of an agreement between the parties to waive a contract, an agreement consisting of mutual promises, the consideration for which is clearly the relinquishment of a right by each promisee. Where a discharge by waiver is alleged as a defense in an action for breach of contract, the cases tend to show that the defendant must set up, in form or substance, a mutual abandonment of claims, or else a new consideration for the waiver.

In *King v. Gillett*, the plaintiff sued for breach of a promise of marriage; the defendant pleaded that before breach he had been *exonerated and discharged* by the plaintiff from the performance of his promise. The Court held that the plea was allowable in form; "yet we think," said ALDERSON, B., "that the defendant will not be able to succeed upon it, . . . unless he proves *a proposition to exonerate on the part of the plaintiff, acceded to by himself*; and this in effect will be a rescission of the contract."

In *Dobson v. Espie*, the plaintiff sued the defendant for non-payment of deposit money due upon a sale of land. The defendant pleaded that, before breach of his promise to pay, the plaintiff had given him *leave and license* not to pay. The Court held that such a plea was inapplicable to a suit for the breach of a contract, and that the defendant should have pleaded an *exoneration and discharge*; but it is difficult to see why the pleader should not have adopted the latter form of plea, unless it were that (according to the reasoning of ALDERSON, B., in *King v. Gillett*)

an *exoneration* means *a promise to exonerate*, which like any other promise needs consideration to support it. It is clear that in *Dobson v. Espie* the plaintiff was to obtain nothing for his alleged waiver; *249 neither the relinquishment of a claim, nor any fresh consideration.

Finally, we have the express authority of PARKE,
6 Exch. 839. B., in *Foster v. Dawber*, for saying that an executed contract, *i. e.*, a contract in which one of the parties has performed all that is due from him, cannot be discharged by a parol waiver. But this case illustrates another feature of the matter under discussion, to which we will now proceed.

Peculiarity
of bills of
exchange
and promis-
sory notes.

To the general rule which we have laid down there is an important exception in the case of bills of exchange and promissory notes. The rights of the holder of such instruments may be waived and discharged without any consideration for such waiver. The point 6 Exch. 839. arose in the case of *Foster v. Dawber*. The plaintiff was executor of one J. C., to whom the defendant had given promissory notes for £1,000 as security for a loan of that amount. Afterwards J. C. had given the defendant a discharge for the promissory note. It was held that the discharge, though unsupported by consideration, was valid.

The Court said, "It is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. *But an executed contract cannot be discharged except by a release under seal, or by performance of the obligation*, as by payment, where the obligation is to be performed by payment. But a promissory note or a bill of exchange appears to stand on a different footing to simple contracts. The rule of law has been so often laid down and acted upon, although there is no case precisely on the point as between immediate parties, that the obligation on a bill

of exchange may be discharged by express waiver, that it is too late now to question the propriety of that rule."

And it was further held that the rule as to bills of exchange, originating in the law merchant by which those instruments are almost entirely governed, would apply to promissory notes which derive their negotiable character from statute. The Statute 3 & 4 Anne, c. 9, makes the same law applicable to both instruments.

[But see contra, Crawford v. Mills, 13 Johns, 87.]

§ 2. *Substituted Contract.*

A contract may be discharged by an alteration in its terms which, in effect, substitutes a new agreement for the old one. The difference between this and the first mentioned mode of discharge by agreement lies in the fact that the first is a total obliteration of the contract, the second is a substitution of a new bond between the parties in place of the old one.

And it operates as a rescission in this way, that if it does not in terms express an intention that the original contract should be waived, it indicates such an intention by the introduction of new terms or new parties. The change of rights and liabilities, and consequent extinction of those which before existed, forms the consideration on each side for the new contract.

But the intention to discharge the original contract must distinctly appear, from the inconsistency of the new terms with the old ones. If there be a mere postponement of performance, for the convenience of one of the parties, the contract is not thereby discharged.

The question has often arisen in contracts for the sale and delivery of goods, where the delivery is to extend over some time. The purchaser requests a postponement of delivery, then refuses to accept the goods at all, and then alleges that the contract was discharged by the alteration of the time of performance;

that a new contract was thereby created, and that the new contract is void for non-compliance with the 17th section of the Statute of Frauds.

But the Courts have always recognized "the distinction between a substitution of one agreement

Hickman v. Haynes, L. R. 10 C. P. 806. *251 for another, and a voluntary forbearance to deliver at the request of another," and will not regard the latter as affecting the rights of the parties further than this, that if a man asks to have performance of his contract postponed, he does so at his own risk. For if the market value of the goods which he should have accepted at the earlier date has altered at the latter date, the rate of damages may be assessed, *Ogle v. Earl Vane, L. R. 2 Q. B. 275.* as against him, either at the time when the performance should have taken place, and when by non-performance the contract was broken, or when he ultimately exhausted the patience of the vendor and definitely refused to perform the contract. *L. R. 3 Q. B. 272.*

The contract is discharged by alteration of its terms when (a) what is to be done is so far altered as to be inconsistent with it and to amount to a new contract, or (b) when a new party is substituted for a previous one by agreement of all three.

(a) Substituted terms. *8 C. B. N. S. 831.* [See *Lawrence v. Dale, 3 Johns. 6 N. Y. 23.*] A good illustration of the first of these modes of discharge is afforded by the case of *Thornhill v. Neats.* A undertook certain building operations for X, which were to be completed by a certain date, or a sum to be paid as compensation for delay. While the building was in progress an agreement was made between the

¹ WILLES, J., in giving judgment in the Exchequer Chamber *L. R. 3 Q. B.* in the case of *Ogle v. Earl Vane,* holds that by the forbearance on the part of the plaintiff, at the request of the defendant, to insist upon delivery of the goods at and after the time for the performance of the contract, an agreement arose which, though for want of consideration for the forbearance it could not furnish a cause for action, was nevertheless capable of affecting the measure of damages. He calls it an Accord without a satisfaction. As to the nature of Accord and Satisfaction, see p. 306.

parties for additional work, by which it became impossible that the whole of the operations should be concluded within the stipulated time. It was held that the subsequent agreement was so far inconsistent with the first as to amount to a waiver of the sum stipulated to be paid for delay.

A contract may be discharged by the introduction (b) Substi-
of new parties into the original agreement, tuted parties.
whereby a new contract is created, in which the *252
terms remain the same, but the parties are
different.

This may be done either by express agreement such See Part III.
as was described in a previous chapter, or by the con- ch. ii. s. 1,
duct of the parties, indicating acquiescence in a change p. 207.
of liability.

If A has entered into a contract with X and M, and X and M agree among themselves that M shall retire from the contract and cease to be liable upon it, A may either insist upon the continued liability of M, or he may treat the contract as broken and discharged by the renunciation of his liabilities by one of the parties to it.

If however A, after he becomes aware of the retirement of M from the contract, continues to deal with X as though no change had taken place, he will be considered to have entered into a new contract to accept the sole liability of X, and will not be entitled to hold M to his original contract.

The case of *Hart v. Alexander* illustrates this rule. 2 M. & W. 484
The plaintiff employed the defendant with other mem-
bers of a firm as his bankers; the defendant retired;
notice, in various forms, of his retirement from the
firm was shown to have reached, or to have been acces-
sible to, the plaintiff, who nevertheless continued to
employ the firm. Finally, the firm became bankrupt:
the plaintiff sued the defendant as liable to him upon
the original contract, as being one of the members of

the firm whom he had retained as his bankers. The jury found that the defendant's retirement was sufficiently brought to the notice of the plaintiff, and as the firm had nevertheless been continuously employed by him, the Court held that a new contract had been formed between the plaintiff and the firm of which the defendant was no longer a member. "I apprehend the law to be now settled," said PARKE, B., "that if one partner goes out of a firm and another comes in, the debts of the old firm may, by the consent of all the three parties — the creditor, the old firm, and the new firm — be transferred to the new firm."

*253 Thus a change of liabilities, accepted by the plaintiff, rescinded the original contract by the creation of a new one to which the defendant was not a party.

[But see
Smith v.
Rogers, 17
Johns. 340.]

§ 3. *Provisions for Discharge.*

A contract may contain within itself the elements of its own discharge, in the form of express provisions for its determination under certain circumstances. These circumstances may be the non-fulfillment of a specified term of the contract; the occurrence of a particular event; or the exercise by one of the parties of an option to discontinue the contract.

Discharge
optional on
non-fulfill-
ment of a
term.

In the first of these three cases, that in which the non-fulfillment of a specified term of the contract gives to one of the parties the option of treating the contract as discharged, we seem to be approaching very near to the subject of the discharge of contract by *breach*. For this too may arise from the non-fulfillment of a term which the parties consider to be vital to the contract.

But there is a marked difference between a non-fulfillment contemplated by the parties, the occurrence of which shall, it is agreed, make the contract deter-

minable at the option of one, and a *breach*, or non-fulfillment not contemplated or provided for by the parties. In the one case the parties have, in the other they have not, looked beyond the immediate objects of the contract: in the one case the default which is to constitute a discharge is specified by the agreement of the parties; in the other it must always be a question of fact or of construction whether or no the default was in a matter vital to the contract, so as to operate as a discharge by breach.

A good illustration is afforded by the case of *Head L. R. 7.
v. Tattersall* of such a condition, or provisional dis-
charge of a contract introduced into its terms. Exch. 7.

A bought a horse of X. The contract of *254 sale contained, among others, these two terms: that the horse was warranted to have been hunted with the Bicester hounds, and that if it did not answer to its description the buyer should be at liberty to return it by the evening of a specified day. It turned out that the horse did not answer to its description and had never been hunted with the Bicester hounds. The horse was returned by the day named, but as it had in the meantime been injured, though by no fault of A, X disputed the right of A to return it. It was held that he was entitled to do so. "The effect of the contract," said CLEASBY, B., "was to vest the property in the buyer subject to a right of rescission in a particular event, when it would revest in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here X *Head v. Tattersall*, L. R. 7 Exch. 14. is the person in whom the property revested, and he must therefore bear the loss."

The parties may introduce into the terms of their Occurrence of a specified contract a provision that the fulfillment of a condition event.

or the occurrence of an event shall discharge them both from further liabilities under the contract.

Condition of bond.

Such a provision is called a *condition subsequen^t*, and is well illustrated by the case of a Bond, which is a promise subject to, or defeasible upon a condition expressed in the Bond.

Excepted risks of charter-party.

Such a provision may be further illustrated by the "excepted risks" of a charter-party. In a contract of that nature the ship-owner agrees with the charterer to make the voyage on the terms expressed in the contract, "the act of God, Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature or kind, during the said voyage *always excepted.*" The occurrence of such an *255 excepted risk releases the ship-owner from the strict performance of the contract; and if it should take place while the contract is wholly executory, and amount to a frustration of the entire enterprise, the parties are altogether discharged.

L. R. 7 Q. B.
404

In *Geipel v. Smith*, the plaintiff had chartered the defendant's vessel to go to a spout, load a cargo of coals, and proceed thence to Hamburg; the contract contained the usual excepted risks. Before anything was done under the contract a war broke out between France and Germany, and the port of Hamburg was blockaded by the French fleet. The defendant thereupon, regarding a blockade as a "restraint of princes," refused even to load a cargo, and treated the contract as being at an end. The plaintiff sued him for not having fulfilled so much of the contract as would not have involved the risk; but the Court held that as a performance of the main object of the contract had become impossible by the occurrence of an excepted risk, the defendant was not bound to attempt a fulfillment of his preliminary duties.

Another illustration may be drawn from the contract entered into by a common carrier. A common carrier is said to warrant or insure the safe delivery of goods entrusted to him; and by this we mean that he makes an almost unqualified promise to bring the goods safely to their destination or to indemnify the owner for their loss or injury. His promise is, however, not wholly unqualified; it is defeasible upon the occurrence of certain excepted risks,—“The act of God and of the Queen’s enemies,” and injuries arising from defects inherent in the thing carried. This qualification is an implied term in every contract made with a carrier, and the occurrence of the risks exonerates him from liability for loss incurred through their agency.

The Act of God is a phrase which needs some explanation, but which has not until very recently received any judicial exposition.

The case of *Nugent v. Smith*, however, affords a good definition of its meaning, so far as its meaning is susceptible of definition. In that case the defendant, a common carrier by sea, received from the plaintiff a mare to be carried from London to Aberdeen. In the course of the voyage the ship met with rough weather, and the mare, being much frightened and struggling violently, suffered injuries of which she died. No negligence was proved against the defendant, but the Court of Common Pleas held him to be liable on the ground that the rough weather was not so violent and unusual as to amount to “the Act of God,” nor was the struggling of the mare alone enough to show that it was from her inherent vice that she was injured. But the Court of Appeal reversed this decision, and endeavored to frame an intelligible definition of such an “irresistible cause of loss” as is described by the term “Act of God.” The difference between the two decisions comes to this: The Court of Common Pleas held that to constitute the “Act of God,”

Per Brett, J., a loss must arise from "such a direct and violent and sudden and irresistible act of nature" as could not be foreseen, or, if foreseen, prevented; the Court of Appeal held "that it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but that it is sufficient to prove that by no reasonable

Per Mellish, *precaution under the circumstances could it have been L. J., p. 441. prevented.*

This exception from the general liability of the carrier of goods is a known and understood term in every contract which he makes. The discharge hence arising must be distinguished from discharge arising from a subsequent impossibility of performance not expressly provided against in the terms of the contract. With this we shall deal hereafter.

Discharge optional with notice.
Nowlan v.
Ablett, 2 C.
M. & R. 54

Thirdly, a continuing contract may contain a provision making it determinable at the option of one of the parties upon certain terms. Such a provision exists in the ordinary contract of domestic service, *257 the servant can terminate the contract by a month's notice, the master by a month's notice or the payment of a month's wages. And similar terms may be incorporated with other contracts between employer and employed, either expressly or by the usage of a trade.

Parker v.
Ibbetson, 4
C. B. N. S.
347.
[See Bridg-
port Bank v.
Dyer, 19
Conn. 137.]

A was engaged by X to serve him for a year as agent in his business of a woolen merchant, but was dismissed in the course of the year at a month's notice. He sued X for breach of contract. It was proved to be a custom of the trade that all such engagements were determinable at a month's notice. The jury found that the custom existed, but they further found that it did not form a part of the contract. The Court, however, decided that, having been found to exist, the custom must be taken to form a part of the contract, and that it was not for the jury to construe the con-

tract so as to exclude it. X was therefore held to be entitled to determine the contract in virtue of this implied term, although the engagement was to have lasted a year had he not exercised the option given to him by the custom.

It remains to consider the form in which it is necessary to express an agreement purporting to discharge a contract already existing.

The general rule is, that a contract must be discharged in the same form as that in which it is made. [Loach v. Farnum, 99 Ill. 368.] A contract under seal can only be discharged by agreement if that agreement is also under seal: a contract entered into by parol may be discharged by parol.

Parties to a deed cannot, therefore, discharge their obligations by a parol contract; but it is possible for them to make a parol contract which creates obligations separate from, and yet substantially at variance with the deed.

If M and X enter into a contract under seal, they but a parol cannot meet and by word of mouth or by writing waive their respective rights under the contract. But though they may make such a contract as does in effect contravene the terms of the deed, and gives a right of action to which the deed furnishes no answer. M and X entered into a contract under seal, by which M let to X certain rooms for a certain time at a rent to be ascertained in a certain way. M died, and A, his administrator, agreed with X by parol, that in consideration of £70 to be paid by X and to be taken as a reasonable rent, neither party should be called upon to perform his part under the deed. X failed to make the payment agreed upon, and A sued him upon the parol contract. It was urged on behalf of X that the parol contract was an attempt to vary the deed by an instrument not under seal; and that a performance of this contract, being no discharge of the deed, would

See per
Willis, J., p.
262.

leave him liable to his previous obligation. But the Court held that the parol contract created a new obligation, and was not an attempt to vary an old one; that a performance of this new contract would furnish a good equitable answer to an action brought upon the contract under seal; and that therefore A was entitled to bring action upon the parol contract.

(2) In case of parol contracts. A parol or simple contract may be discharged by writing or by word of mouth, whether or no the original contract be in writing; and this follows from what has been said before, that the writing is not the agreement but the evidence of it, and that as the essentials of agreement lie in the expressed intention of the parties and not in the writing which is the instrument of that expression, the contract may be discharged "*eo ligamine quo ligatum est*," by a valid expression of the intention to put an end to it.

Under 29 Car. II. c. 8, s. 4. But an exception must be made where a contract is required by Statute to be in writing. In such a case there appears to be authority for saying that an absolute discharge of the contract may take place by word [Arrington v. of mouth. But if the discharge be not a simple rescis-
Porter, 47 Ala. 714; Guthrie v. Thompson, 1 Oregon 353.] *259 as arises from the making of a new agreement inconsistent with the old one, then there must be writing such as would satisfy the enactment which governs the original contract.

The most recent authority upon this point is the L. R. 2 Exch. case of *Nobles v. Ward*. There a contract was made 185. [See Bacon v. Cobb, 45 Ill. 47.] for the sale of goods upon the 18th of August, in which it was agreed that the goods should be delivered within a certain time. This contract was in writing and satisfied the requirements of 29 Car. II. c. 3, s. 17. On the 27th of September a verbal agreement was made extending the time for delivery. An action was brought by the vendors for non-acceptance of the goods, and "the defendants contended that the effect

of the contract to extend the time for delivery was to rescind the contract of the 18th of August." But the agreement of the 27th of September, being made by word of mouth, was invalid, and could not operate as a new contract for the sale of the goods. The defendants, nevertheless, contended that though invalid to create a new contract, it was valid to rescind the existing one, but this contention the Court would not allow. It was, in fact, laid down "that no rescission could take place by an invalid contract."

The same rule has been applied to contracts under the 4th, and contracts under the 17th sections of the Statute of Frauds, and yet it should seem that a different principle might have been applied to the two sections. If A and X make a contract in writing under the 17th section and afterwards attempt to vary it by word of mouth, they make a new and, strictly speaking, a void contract, one which the Statute says shall not "be held to be good." A worthless agreement is obviously as incapable of rescinding existing obligations as it is of creating new ones. But a contract made in breach of the 4th section is not invalid, but incapable of proof, and so unenforceable. If therefore A and X make a contract which satisfies the requirements of the 4th section and afterwards attempt to vary it by word of mouth, they make a new contract which, though it cannot be sued upon, is still effectual for some purposes. It is at any rate so far a valid expression of the intention of the parties, as that a part performance of it will under certain circumstances give a right to specific performance in equity; thus it is not easy to see, upon principle, why it should not operate as an agreement which, though unenforceable in regard to the liabilities which it creates, is valid as an expression of intention to rescind an existing contract. However, the law is otherwise, and inasmuch as the distinction which

has been made between the effect of the two sections of the Statute of Frauds has been more than once commented upon with disapprobation by the late Mr. Williams v. Justice WILLES, it is not probable that further consequences will be deduced from the difference between Wheeler, 8 C. B. N. S. 316. the unenforceability created by the 4th section and the invalidity created by the 17th section.

CHAPTER II.

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DISCHARGE OF CONTRACT BY PERFORMANCE.

THIS branch of our subject need not detain us long, but there are some aspects of performance which will call for a brief notice.

We must distinguish performance which discharges one of two parties from further liabilities under a contract, and performance which amounts to an extinction of the obligation.

Where a promise is given upon an executed consideration, the performance of his promise by the promisor discharges the contract; all has been done on both sides that could be required to be done under the contract.

Where one promise is given in consideration of another, performance by one party does not necessarily discharge the contract, though it discharges him who has performed his part from doing more. Each must have done his part to make performance a *solutio obligationis*, and so if one has done his part and not the other, it is still possible that the contract may be discharged in any one of the ways we have mentioned.

Whether or no a contract has been performed is a matter which, so far as the person performing the contract is concerned, must be answered by reference to the *operation of contract*; so far as the performance is concerned, must be answered by reference to the *construction of contract*. If there be a failure of

*262 performance, partial or total, then the contract is broken; whether the breach amounts to a discharge is a question to be discussed hereafter.

But there are two aspects of Performance which we may shortly dwell upon: these are, Payment and Tender.

PAYMENT.

Payment as a mode of discharge.

In dealing with payment as a form of discharge, we must place it under the head of performance, although payment is intimately connected with the discharge of contract and of the rights arising from breach of contract, by means of a substituted agreement.

If in a contract between A and X the liability of X consists in the payment of a sum of money in a certain way or at a certain time, such a payment discharges X by the performance of his agreement.

If, again, X being liable to perform various acts under his contract, wishes instead to pay a sum of money, or, having to pay a sum of money, wishes to pay it in a manner at variance with the terms of the contract, he must agree with A to accept the proposed payment in lieu of that to which he may have been entitled under the original contract. Payment is then a performance of X's duties under the new agreement, and, so far as he is concerned, a consequent discharge, [the new agreement and payment under it making an accord and satisfaction.]

Again, where one of two parties has made default in the performance of his part of the contract, so that a right of action accrues to the other, the obligation formed by this right of action may be discharged by accord and satisfaction, an agreement the consideration for which is usually a money payment, made by the party against whom the right exists, and accepted in discharge of his right by the other.

See Part V.
ch. iii. a. 4,
p. 306.

Payment is Payment, then, is the performance of a contract,
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whether it be a performance of an original, or of a substituted contract, or of a contract in which payment is the consideration for a forbearance *263 to exercise a right of action which may have arisen from the breach of an agreement.

It remains to notice some points which arise when a negotiable instrument is given in payment of a sum due, whether as the performance of a contract or in satisfaction for the breach of it.

The giving of such an instrument in payment of a liquidated or unliquidated claim is in effect a substitution of a new agreement for the old one, but it may affect the relations of the parties in either one of two different ways.

If X makes a payment to A either in performance of an existing contract, or in satisfaction of a broken contract, and that payment takes the form of a negotiable instrument, X may be discharged from his previous obligation either absolutely or conditionally.

A may take the bill or note, and promise, in consideration of it, expressly or impliedly, to discharge X altogether from his existing liabilities. A then relies upon his rights conferred by the instrument, and if it be dishonored, must sue on it, and cannot revert to the original cause of action. But the presumption, where a negotiable instrument is taken in lieu of a money payment is, that the parties intended it to be a conditional discharge. The position of the parties then is this: A having certain rights against X, has agreed to take a negotiable instrument instead of immediate payment, or immediate enforcement of his right of action, and X has so far satisfied A's claim. But if the bill be dishonored at maturity, the consideration for A's promise has wholly failed and his original rights are restored to him. The agreement is "defeasible upon condition subsequent;" the payment by X which is the consideration for the promise by A is not

absolute, but may turn out to be, in fact, no payment at all.

Payment then consists in the performance either of an original or substituted contract by the delivery of money, or of negotiable instruments conferring *264 the right to receive money; and in this last event the payee may have taken the instrument in discharge of his right absolutely, or subject to a condition (which will be presumed in the absence of expressions to the contrary) that, if payment be not made when the instrument falls due, the parties revert to their original rights, whether those rights are, so far as the payee is concerned, rights to the performance of a contract or rights to satisfaction for the breach of one.

See judgment of Parke, B., Robinson v. Read, 9 B. & C. 455.

Sayer v. Wagstaffe, 5 Beauv. 423.

We have dwelt thus upon Payment because it is often so involved with the subject of substituted agreement as to cause some obscurity.

TENDER.

Tender.

We now come to an attempted Performance, or Tender. The word is applied to performance of two kinds, and to attempts to perform which are not similar in their results. It is applied to a performance of a promise to do something, and to a performance of a promise to pay something. In each case the performance is frustrated by the act of the party for whom the performance is to take place. Where in a contract for the sale of goods the vendor satisfies all the requirements of the contract as to delivery, and the purchaser nevertheless refuses to accept the goods, the vendor is discharged by such a tender of performance, and may either maintain or defend successfully an action for the breach of the contract.

Tender by delivery.

Startup v. Macdonald, 6 M. & G. 593. Benjamin on Sales, bk. iv. part 2, p. 563.

Tender of payment.

But where the performance due consists in the payment of a sum of money, a tender by the debtor, although it may form a good defense to an action by

the creditor, does not constitute a discharge of the debt.

Dixon v.
Clarke, 5 C.
B. 376.

If the creditor will not take the money due to him when he has a right to demand it, he puts himself at a certain disadvantage in trying to recover it by action; but the debtor must, in order to defend himself successfully by a plea of tender, continue always ready and willing to pay the debt. Then when he is sued upon it, he can plead that he tendered it, but he must also pay the money into court.

*265 Dixon v.
Clarke, 5 C.
B. 376.
[Colby v.
Stevens, 38
N. H. 191.]

If he proves his plea, the plaintiff gets nothing but the money which was originally tendered to him, the defendant gets judgment for his costs of defense, and is so placed in as good a position as he held at the time of the tender.

Tender, to be a valid performance to this extent, must observe exactly any special terms which the contract may contain as to time, place and mode of payment. Besides these requirements the tender must be an offer of money produced and accessible to the creditor, not necessarily of the exact sum, but of such a sum as that the creditor can take exactly what is due without being called upon to give change.

Legal tender, as regards coinage and notes, is regulated by [the Constitution of the United States and the acts of Congress.]

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CHAPTER III.

DISCHARGE OF CONTRACT BY BREACH.

Breach of
contract.

If one of two parties to a contract breaks through the obligation which the contract imposes, a new obligation will in every case arise, a right of action conferred upon the party injured by the breach. Besides this, there are circumstances under which the breach will *discharge* the injured party from such performance as may still be due from him. We must, however, bear in mind that, though every breach of the contractual obligation confers a right of action upon the injured party, every breach does not necessarily discharge him from doing what he has undertaken to do under the contract. The contract may be broken wholly or in part; and if in part, the breach may or may not be sufficiently important to operate as a discharge; or, if it be so, the injured party may choose not to regard it as a breach, but may continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained by the breach. It is often very difficult to ascertain whether or no a breach of one of the terms of a contract discharges the party who suffers by the breach.

By *discharge* we must understand, not merely the right to bring an action upon the contract because the other party has not fulfilled its terms, but the right to consider oneself exonerated from any further performance under the contract — the right to treat the legal relations arising from the contract as having come to an end, and given place to a new obligation, a *right of action*.

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The discharge of contract is indicated with some precision by the pleadings in use before the Judicature Acts. Many of the cases which illustrate this part of the subject turn upon questions of pleading, and we shall find that the understanding of the remedy, as often happens, is a material assistance to the ascertainment of the right. At the risk of a digression we will turn for a moment to this aspect of the question before us.

§ 1. POSITION OF PARTIES WHERE A CONTRACT IS DISCHARGED BY BREACH.

In a contract between A and X, a breach by X might be considered to be a discharge of the contract if A, in bringing action upon it, was not required to allege that he had performed or endeavored to perform that which was still due from him under the contract; or if X could not successfully use such non-performance by A either as a cause of action or a ground of defense.

Further, where X made default after A had done all or a part of that which he promised, the contract was discharged by such default if A could sue for the value of that which he had done in *indebitatus assumpsit*, or upon a new and distinct contract arising upon the acceptance of money, goods, or services offered by the plaintiff and accepted by the defendant.

This needs a short explanation.

Where an action is brought upon a contract arising on consideration executed, that is a promise, acted or uttered, to pay for money, goods, or services offered and accepted, the plaintiff may state his case in certain short forms known as the *indebitatus counts*. These, which are an adaptation of the action of *Assumpsit* to the subject-matter of the action of *Debt*, do no more than state a money claim

See App. A. existing for money due, goods supplied, or services rendered.

When applicable to special contract.

In certain cases these counts are applicable to a claim arising out of a special contract, that is a contract arising upon express promises made on either side, but they are so applicable only where the contract was *discharged by breach*.

If A has performed all that he promised in a contract made with X, and there remains only a money payment due from X resulting in a present liability in which X made default by non-payment, A may sue X in the form of an *indebitatus* count. This means that A may sue upon a new and distinct contract, arising upon the offer and acceptance of that which he had performed. The performance of the original contract was so far completed that nothing remained to be done but a payment to be made by X to A: the payment was presently due; default discharged the contract, and A may sue, not on the special contract as having been made and broken, but upon a contract arising from conduct, from the offer of an act, its acceptance, and a consequent implied promise to pay its worth, such as we described in speaking of executed consideration.

Ante, p. 83.

"The principle as to the proper form of declaring where the original contract has been executory, but the period of credit has expired, or condition has been performed, is, not that the law alters the mode of declaring on the original contract and states it not according to the fact, but that *it conclusively infers that simple contract to pay the price for goods sold and delivered which would arise upon the facts of a sale and delivery without any special circumstances accompanying them*. He who seeks to disturb that inference must not content himself with merely showing conditions, or other special provisions forming part of the contract at the time of its being entered into: *he must*

Per Cur.,
Beverley v.
Lincoln Gas

show them in existence and operation at the time of action brought: if not, they must be struck out of consideration and "the contract treated as originally simple, unconditional, and executed."

Light & Coke Co., 6 A. & E. 837. [See Lane v. Adams, 19 Ill. 169.]

A similar practice prevails where, A having done a part, though not all that he was bound to do under the contract, X committed a breach which amounted to a discharge. If that which A has done could be represented in a claim for money payment, A is entitled to sue, not only on the special contract, but in *indebitatus assumpsit*, for a *quantum meruit* or the value of so much as he had done.

"If a man agrees to deliver me one hundred quarters of corn, and after I have received ten quarters, I decline taking any more, he is at all events entitled to recover against me the value of the ten that I have received."

But the right to sue in this form on a *quantum meruit* is frequently and emphatically stated to depend on the fact that the contract has been discharged. On the other hand, it is laid down "as an invariably true proposition, that wherever one of the parties to a special contract not under seal has in an unqualified manner refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a *quantum meruit*, for anything which he had done under it previously to the rescission."

It is possible that A may have done nothing under the contract which can be estimated at a money value, or that the default made by X is not such as can be stated in the form of a money claim. Then if the breach amounts to a discharge, A is exonerated from such performance as may still be due from him, and is

[See Cast v. Roff, 26 Ill. 452.]

entitled to sue at once upon the special contract for such damages as he has sustained.

Rights of
party dis-
charged.

*270 Thus where a contract between A and X is discharged by the default of X, A may—

Behn v. Bur-
ness, 3 B. &
S. 756.
Cort v. Am-
bergate
Railway Co.,
17 Q. B. 127.

(a) Consider himself exonerated from any further performance which may have been due on his part; and successfully defend an action brought for non-performance:

(b) Sue at once upon the contract for such damages as he has sustained by its breach, without being obliged to show that such performance has been done or tended by him:

Planché v.
Colburn, 8
Bing. 14.

(c) Lastly, if he has done all or a portion of that which he promised, so as to have a claim to a money payment for such performance, he may deal with such a claim as due upon a different contract arising upon a promise understood from the acceptance of an executed consideration.

§ 2. FORMS OF DISCHARGE BY BREACH.

We are now in a position to ask, What are the circumstances which confer the rights just mentioned? What is the nature of the breach which amounts to a discharge?

Modes in
which those
rights may
arise.

A contract may be broken in any one of three ways: a party to a contract may (1) renounce his liabilities under it, (2) may by his own act make it impossible that he should fulfill them, (3) may totally or partially fail to perform what he has promised.

Of these forms of breach the first two may take place while the contract is still wholly executory, *i.e.*, before either party is entitled to demand a performance by the other of his promise. The last can, of course, only take place at or during the time for the performance of the contract. We will therefore deal first with renunciation and impossibility created by

the act of one party *before* performance is due, then with such renunciation and impossibility so created *in the course* of performance, and then *271 with simple failure in performance.

(1) *Discharge by renunciation before performance is due.*

The parties to a contract which is wholly executory (1) Breach have a right to something more than a performance of ^{before per-}formance the contract when the time arrives. They have a right ^{is due,} to the maintenance of the contractual relation up to that time, as well as to a performance of the contract when due.

It is now settled that a renunciation of a contract by renuncia-^{tion,} by one of the parties before the time for performance has come, discharges the other, if he so chooses, and entitles him at once to sue for a breach.

Hochster v. Delatour is the leading case upon this subject. A engaged X upon the 12th of April to enter [Crist v. Ar-^{nour, 34 Barb. 378.]} into his service as courier and to accompany him upon a tour; the employment was to commence on the 1st of June, 1852. On the 11th of May A wrote to X to inform him that he should not require his services. X at once brought an action, although the time of performance had not arrived. The Court held that he was entitled to do so. "Where there is a contract to p. 639. do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case, of traveler and courier, from the day of hiring till the day of employment was to begin they were engaged to each other; and it seems to be a

breach of an implied contract if either of them renounces his engagement."

It seems hardly necessary to have created an implied contract in order to give the plaintiff in this case a right of action.

If X makes a binding promise to A, the obligation comes into existence at once, and consists in X's promise as well as in his performance of that promise. In other words, the contract is a contract from the time it is made, and not from the time that performance of it is due; and if this is so, it seems hardly in accordance with reason to introduce into every contract an implied promise that, up to a certain period of its existence, it shall not be broken.

Frost v. Knight, L. R. 7 Exch. 114, in Exch. Cham. 2 E. & B. 678. The sense of the rule is very clearly stated by COCKBURN, C. J., in a case which offers a somewhat further development of the rule in *Hochster v. Delatour*.

is a discharge even if performance be contingent. In that case a time was fixed for performance, and before it arrived the defendant renounced the contract. In *Frost v. Knight* performance was contingent upon an event which might not happen within the lifetime of the parties.

L. R. 7 Exch. at p. 114. [Burtis v. Thompson, 42 N. 246.] A promised to marry X upon his father's death, and during his father's lifetime renounced the contract; X was held entitled to sue upon the grounds explained above. "The promisee," said COCKBURN, C. J., "has an inchoate right to the performance of the bargain, which becomes complete when the time for performance arrives. *In the meantime he has a right to have the contract kept open as a subsisting and effective contract.* Its uninpaired and unimpeached efficacy may be essential to his interests."

The promisee may therefore treat the contract as broken, so soon as the promisor has announced his intention to break it; but if he will not accept the renunciation, but continues to insist on the performance of the promise, the contract remains in existence

The promisee must treat renunciation as a discharge.

for the benefit and at the risk of both parties, and if anything occur to discharge it from other causes, the promisor may take advantage of such discharge.

Thus in *Avery v. Bowden*, A agreed with X by 5 E. & B. charter party that his ship should sail to Odessa
⁷¹⁴ and there take a cargo from X's agent, which *273 was to be loaded within a certain number of days. The vessel reached Odessa, and her master demanded a cargo, but X's agent refused to supply one. Although the days within which A was entitled to load the cargo had not expired, his agent, the master of the ship, might have treated this refusal as a breach of contract and sailed away. A would then have had a right to sue upon the contract. But the master of the ship continued to demand a cargo, and before the running days were out—before, therefore, a breach by non-performance had occurred—a war broke out between England and Russia, and the performance of the contract became legally impossible. Afterwards A sued for breach of the charter party, but it was held that as there had been no actual failure of performance before the war broke out (for the running days had not then expired), and as the renunciation of the contract had not been accepted as a breach by A's *Avery v. Bowden*, X was entitled to the discharge of the contract 5 E. & B. 714 which took place upon the declaration of war.

(2) *Impossibility created by one party before performance is due.*

If a renunciation of his contract by A discharges X (2) By and gives him a right of action before the time for ^{making per-} performance has arrived, it would appear that *a fortiori* a similar discharge and right of action accrues to X if A, before the time for performance arrives, makes it impossible that he shall perform his promise. A promised X that within seven years from the date of the promise he would assign to X all his interest in a

Lovelock v.
Franklyn, 8
Q. B. 371.

Lovelock v.
Franklyn, 8
Q. B. at p.
378.

[See Clark v.
Crandall, 8
Barb. 612.]

lease which he held. Before the end of seven years A assigned his whole interest to another person. It was held that X could sue at once, without waiting until the end of seven years. "The plaintiff has a right to say to the defendant, You have placed yourself in a situation in which you cannot perform what you have promised; you promised to be ready during the period of seven years, and during that period I may at any time tender you the money and call for an assignment, and expect that you should keep yourself ready; but if I now were to tender you the money, you would not be ready; this is a breach of the contract."

The cases just cited illustrate the rule that contract may be broken while it is yet executory, and before any performance on either side has fallen due. They are comparatively simple, because the circumstances leave no doubt of the intention of the party in default; their interest lies in the enforcement of the principle that performance of a promise is not all that a promisee is entitled to, that the continuous liability of the promisor, until the time for performance arrives, is a substantial element in the rights arising from the contract, and that a refusal to maintain this liability is an immediate breach and confers an immediate right of action.

(3) *Renunciation in the course of performance.*

Renuncia-
tion during
perform-
ance.

The forms of breach with which we have just been dealing may occur at a later stage in the history of the contract. It is possible that in the course of performance one of the parties may by word or act deliberately and avowedly refuse performance of his part. He may do this by renouncing the contract, or by rendering it impossible of performance. The other party is then exonerated from a continued performance of his promise, and is at once entitled to bring action.

An illustration of such a discharge by renunciation of the contract is furnished by the case of *Cort v. The Ambergate Railway Company*. The plaintiffs contracted with the defendant Company to supply them with 3,900 tons of railway chairs at a certain price. The chairs were to be delivered in certain quantities at specified dates. The plaintiffs delivered 1,787 tons according to contract; the defendants then desired them not to deliver more as they would not be wanted. The plaintiffs sued the defendants upon the contract, averring that they had been ready and willing to perform their part, and had been prevented from doing so by the Company. The plaintiffs having obtained a verdict, a new trial was moved for on behalf of the Company, on the ground that the plaintiffs should have proved not merely readiness and willingness to deliver, but an actual delivery of the chairs; but the Court of Queen's Bench held that where a contract was renounced by one of the parties to it, the other party need not do more than show that he was willing to have performed his part. "In common sense," said Lord CAMPBELL, O. J., "the meaning of such an averment of *readiness and willingness* must be that the non-completion of the contract was not the fault of the plaintiffs, and they were disposed and able to complete it, if it had not been renounced by the defendants. What more can reasonably be required by parties for whom the goods are to be manufactured?"

And he thus states the principle on which the Court decided in favor of the plaintiff:

"Upon the whole we think we are justified, on principle and without trenching on any former decision, in holding that, when there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods

contracted for, gives notice to the vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract; and that he is entitled to a verdict on pleas traversing allegations that he

Cort v.
Ambergate
Railway
Company, 17
Q. B. 127.

*276 was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them.

(4) *Impossibility created by one party in the course of performance.*

Impossi-
bility created
during per-
formance.

The rule of law is similar in cases where one party has by his own act made the contract impossible of performance.

8 Bing. 14.

In *Planche v. Colburn* the plaintiff was engaged by the defendants for £100 to write a treatise on "Costume and Ancient Armor" to be published in a serial called "The Juvenile Library." The plaintiff incurred expense in making researches with a view to his work and actually completed a portion of it, but before it was delivered to the defendants they had abandoned the "Juvenile Library" on the ill-success of its first numbers. The plaintiff sued the defendants on the special contract and also on a *quantum meruit* for the work and labor expended by him on his treatise. He thus set up two distinct contracts, the original executory contract for the breach of which he claimed damages, and a contract arising from the execution of work upon request, under which he claimed the value of so much work as was done before the contract was put an end to by the plaintiff. It was argued that he could not recover upon this latter aspect of his claim because, his part of the original

contract being unperformed, that contract was not *ante*, p. 269. wholly at an end: but the Court held that the abandonment of the publication in question did put an end to the contract and affect a discharge.

"I agree," said TINDAL, C. J., "that, when a special contract is in existence and open, the plaintiff cannot sue on a *quantum meruit*; part of the question here, therefore, was, whether the contract did exist or not. It distinctly appeared that the work was *277 finally abandoned; and the jury found that no new contract had been entered into. Under these circumstances, the plaintiff ought not to lose the fruit of his labor; and there is no ground for the application that has been made."

(5) *Breach by failure of performance.*

In the two cases of discharge last dealt with it is apparent that X has in word or act so dealt with the contract as to intimate to A that a further performance on his part is needless. The Courts have been asked in these cases to decide whether A is bound to tender a performance which he well knows that X will not or cannot receive, and they have decided that he is not so bound.

But where the breach of contract by X does not make the contract wholly incapable of performance, or is not accompanied with any overt expression of intention to abandon his rights, it is not always easy to determine whether A is thereby discharged or whether he merely acquires a right of action from the breach. We have to look to the terms of the contract and endeavor to ascertain the intention of the parties as to the nature of their respective promises; and the difficulties resolve themselves into this question, Were the promises of the parties *independent of, or conditional upon, one another?* By independent or conditional character of promises.

INDEPENDENT PROMISES.

An independent promise may be absolute. A promise may be independent in several ways.
 (a) A promise may be *absolute*.

A's promise to X may be wholly unconditional upon the performance by X of his promise to A. In such a case a failure of performance by X would not discharge A, but would only furnish ground for an action against X.

divisible in respect of performance. (b) The performance of a promise may be *divisible*.

*278 The promise may be susceptible of more or less complete performance, and the damage sustained by an incomplete performance or partial breach may be apportioned according to the extent of failure. The promise is in fact regarded as a number of promises to do a number of similar acts, and a breach of one of these does not discharge the promisee.

Subsidiary. (c) A promise may be *subsidiary*.

The breach committed by one of the parties may be a breach of a term of the contract only, and of a term which the parties have not, upon a reasonable construction of the contract, regarded as vital to its existence. The injured party is then bound to continue his performance of the contract, but may bring action to recover such damages as he has sustained by the default of the other.

Absolute Promises.

In absolute promises, one party relies on the promise and not its performance by the other. If A made a promise to X in consideration of a promise made by X to A, and A has not, in express terms, or upon a reasonable construction of the contract, made the performance of his promise depend upon the performance of X's promise, a breach of his promise by X will not discharge A. The position of A is this—his promise is given in consideration of X's

promise, not in consideration of the performance by X of his promise: in other words, he has been content with X's liability, and has not insisted upon X's performance as a security for his promise.

Some of the old cases upon this subject turn upon very technical constructions of terms: if A made a promise to X in consideration of its being "*agreed*" that X do something for A, each promise is regarded as absolute and independent of the other; if the promise be made "*provided*" that X do something for A, the promise of A is conditional, and is discharged upon breach by X.

A case of the year 1649 will furnish a strong illustration of such absolute promises. "Ware v. Chappell, Style, 186." Ware brought an action of debt for £500 against *279 Chappell upon an indenture of covenants between them, viz.: that Ware should raise 500 soldiers and bring them to such a port, and that Chappell should find shipping and victuals for them to transport them to Galicia; and for not providing the shipping and victuals at the time appointed was the action brought. The defendant pleaded that the plaintiff had not raised the soldiers at that time; and to this plea the plaintiff demurs. ROLLE, C. J., held that there was no condition precedent, but that they are distinct and mutual covenants, and that there may be several actions brought for them: and it is not necessary to give notice of the number of men raised, for the number is known to be 500; and the time for the shipping to be ready is also known by the covenants; and you have your remedy against him if he raise not the men, as he hath against you for not providing the shipping."

The reason for holding such promises to be *absolute* is thus stated by HOLT, C. J.: "What is the reason assigned for rule by that mutual promises shall bear an action without performance? One's bargain is to be performed accord-

ing as he makes it. If he makes a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be, that A shall have the horse of B and A agree that B shall have his money, they may make it so; and there needs no averment of performance to maintain an action on either side; but if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed before his doing what he undertakes of his side, it must then be averred; as where a man agrees to give so much money for a horse, it is plain he meant to have the horse first, and, therefore, he says the money shall be given for the horse."

*Thorpe v.
Thorpe, 12
Mod. Rep.
455.*

by Willes,
C. J.
Willes, 496.

And another reason is suggested by WILLES, C. J., in *Thomas v. Cadwallader*, namely, "When two covenants in a deed have no relation to each other,

*280 I was clearly of opinion that the non-performance of one could not be pleaded in bar to an action brought for the breach of another covenant in the same deed; and for this plain reason amongst others, that the damages sustained by the breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other."¹

Tendency
of modern
decisions.

8 T. R. 306.

Per Gard-
iner, J., in
*Grant v.
Johnson.*
[6 N. Y. 247.]

The cases dating from the close of the last century seem to show a tendency of the Courts not to construe promises to be independent of one another where they form the whole consideration for one another unless there be some very definite expression of the intention of the parties to that effect. "The older cases," says GROSE, J., in *Glazebrook v. Woodrow*, "lean to construe covenants of this sort to be independent, contrary

¹ But this view of the matter is certainly open to the criticism passed upon it by an American judge: "Courts are not required to speculate upon the inequality of loss to the parties, or to look beyond the agreement to its performance in order to ascertain its character as suggested by some judges and commentators."

to the real sense of the parties and the true justice of the case;" and the interpretation of such promises may now be taken to rest upon "the good sense of the Per Lord Kenyon, C. case and the order in which the things are to be done." J., in Morton v. Lamb, 7 T. R. 125. The order in which the things are to be done would appear now to be the main test of the existence of [See Biddle v. Coryell, 3 Har. N. J.

Thus where X makes a promise to A, the date of 377.] performance not being fixed, and A in consideration thereof promises to pay a sum of money to X at a fixed date, the payment is independent of performance.

In March, 1879, A agrees to purchase land of X and covenants to pay a sum of money on the 1st of April, 1879. X covenants in turn to convey the lands to A, but no day is fixed for the execution of the conveyance. So soon as the 1st of April is past, X can sue A for the money, and it is no answer to his claim that he has never conveyed, or offered to convey the land to X.

The reason of the rule is thus stated in the 10 A. & E. case of *Mattock v. Kinglake*, the facts of which *281⁵⁰. were similar to those just described:

"A time being fixed for payment, and none for Per Little-
doing that which was the consideration for the pay-<sup>dale, J., in
ment, an action lies for the purchase money without Kinglake, 10
averring performance of the consideration." A. & E. 50.
[Robb v.</sup>

But, upon the whole, it may be safe to say that, in Montgom-
the absence of very clear indications to the contrary, ery, 20 John-
promises each of which forms the whole considera-
son, 15.]
tion for the other will not be held to be independent of one
another. A failure to perform the one will exonerate
the promisee from a performance of his part. (a)

(a) [See Parsons on Contracts, 6th ed. vol. 2, p. 529, note, for a full discussion of this subject.]

Promises the performance of which is divisible.

Where performance is divisible,

- Contracts frequently occur in which the promise of one or both parties admits of a more or less complete performance; such would be a contract by way of charter party to load and deliver a complete cargo; or a contract for the sale of goods in which delivery and acceptance are to take place by installments extending over a considerable period of time.

a partial breach is no discharge;

In contracts of this nature it may be laid down as a general rule, that a breach which only deprives the promisee of a part of that to which he was entitled, does not discharge him from such performance as may be due from him.

10 East, 295.
[See Preston v. Finney,
2 Watts & Ser. 53.]

In *Ritchie v. Atkinson* the plaintiff promised to take his ship to St. Petersburgh and there load a *complete cargo* of hemp and iron, and to deliver the same on being paid freight at specified rates. He came away with an incomplete cargo, under a mistaken impression that an embargo was about to be laid on British ships, and the defendant refused to pay any freight, on the ground that the completeness of the cargo was a condition precedent to any payment being due.

Lord ELLENBOROUGH said that whether it was so, or no, depended "not on any formal arrangement *282 of words, but on the reason and sense of the thing as it is to be collected from the whole contract;" and with regard to the promise before us, he held that "where the freight is made payable upon an indivisible condition, such as the arrival of the ship with her cargo at her destined port of discharge, such arrival must be a condition precedent; because it is incapable of being apportioned: *but here the delivery of the cargo is in its nature divisible, and therefore I think it is not a condition precedent;* but the plaintiff is entitled to recover freight in proportion to the extent of such delivery; leaving the defendant to his remedy in damages for the short delivery."

Ritchie v. Atkinson, 10 East, 295.

The case of *Simpson v. Crippin* was decided upon L. R. 8 Q. B. similar grounds. In that case A agreed with X to supply him with a given quantity of coal to be delivered in equal monthly installments for twelve months. X agreed to send wagons to receive the coal. X did not during the first month send wagons to receive one-twelfth of the coal. A rescinded the contract. It was held that he was not entitled to do so, inasmuch as X was willing to continue the contract as to the remaining installments, and it did not appear to have been the intention of the parties to determine the contract upon the failure of one of the parties to fulfill one of a series of terms.

And in the case of *Freeth v. Burr*, in which the same L. R. 9 C. P. point arose, KEATING, J., said, "It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract."

Thus it will be noted that if a default in one item unless it show intent of a continuous contract of this nature be accompanied by break with an announcement of intention not to perform the contract, form the contract upon the agreed terms, the other party may treat the contract as being at an end. And B. & Ad. 882. in like manner, if non-payment of one installment of goods be accompanied by circumstances which give the seller reasonable ground for thinking *283 *Bloomer v. Withers v. Reynolds*, 2 that the buyer will not be able to pay for the rest, he may take advantage of the one omission to 688. repudiate the contract.

It must be further noted that the general rule applicable to contracts of this sort may be contravened by express stipulation. It is always open to the parties to agree that the entire performance of a consideration, in its nature divisible, shall be a condition precedent to the right to a fulfillment by the other party of his promise. In such a case nothing can be ob-

tained either upon the contract or upon a *quantum meruit* for what has been performed. Thus in *Cutter v. Powell*, a sailor being at Jamaica, took a promissory note from the master of his ship to the following effect: 6 T. R. 320, and see 8m. L. C. ii. 1, and notes thereon. [See Hansell v. Erickson, 28 Ill. 257.]

"Ten days after the ship Governor Parry, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, *provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool*. Kingston, July 31st, 1793." The sum agreed to be paid was larger than the ordinary wages of a mate. The ship sailed on the 2nd of August, and reached Liverpool on the 9th of October; the sailor did his duty as second mate until the 20th of September, when he died. It was held that his representatives could not recover upon the express contract, for its terms were unfulfilled; nor could they recover upon a *quantum meruit* for such services as he had rendered, because the terms of the express contract excluded the arising of any such implied contract as would form the basis of a claim upon a *quantum meruit*. "It may fairly be considered," said GROSE, J., "that the parties themselves understood that if the whole duty were performed the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage."

*284

Subsidiary promises.

Subsidiary Promises:

We shall have to speak, in a later portion of this chapter, of subsidiary promises, or *warranties* as we will venture to call them, as distinct from *conditions* or terms on which the right to performance depends. But it is desirable to illustrate here the difference which exists between a subsidiary promise the breach of which cannot under any circumstances operate as a discharge, and a promise such as we have described, which admits of being performed with more or less

completeness, but which may be so completely broken as to discharge the promisee.

A good instance of such a subsidiary promise is to be found in the case of *Bettini v. Gye*. There the L. R. 1 Q. B. plaintiff, a professional singer, entered into a contract D. 187. with the defendant, director of the Royal Italian Opera in London, for the exclusive use of his services as a singer in concerts and operas for a considerable time, and upon a number of terms, one of which was as follows:

“(7.) M. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals.”

The plaintiff broke this term by arriving only two instead of six days before the commencement of the engagement, and the defendant treated this breach as discharge of the contract. The Court held that in the absence of any express declaration that the term was vital to the contract, it must “look to the whole how distinguished contract, and see whether the particular stipulation from Condi goes to the root of the matter, so that a failure to per- tions. form it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages.” And it was decided that the term did not go to the root of the matter, so as to require to be considered a condition precedent. And generally it may be said that *285 where a promise is to be performed in the course of the performance of the contract and after some of the consideration, of which it forms a part, has been given, it will be regarded as subsidiary, and its breach will not effect a discharge unless there be words expressing that it is a condition precedent, or unless the performance of the thing promised be plainly essential to the contract. “Where a person

has received part of the consideration for which he entered into the agreement, it would be unjust that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing anything for it. Therefore the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damages he may have sustained in not having received the whole consideration."

Per Parke,
B., in Graves
v. Legg, 9
Ex. 716.

Warranty of quality, when subsidiary. Another illustration of a subsidiary promise of this nature is to be found in the warranty of quality in a sale of goods.

Where a contract of sale is executory, so that the property in the chattel has not passed to the buyer, and the terms of the sale include a promise that the chattel shall possess a particular quality, the acceptance of the chattel by the buyer is *conditional* on its possessing that quality. Having promised to take, and pay for an article of a particular sort, he is not obliged to receive one which is not of the sort he bargained for.

Benjamin on Sale. [Sec. 805.] But if the contract of sale be executed, as being in its inception such a *bargain and sale*, of a specific chattel as was described in an earlier chapter, the promise as to quality becomes *subsidiary*. For, the property having passed, the buyer can only reject the goods if there be an express condition that he should do so, (as L. R. 7 Ex. 7. in *Head v. Tattersal*), or possibly in the event of the goods being different in description to the terms of the agreement, or wholly worthless in quality.

See post,
p. 292,

**Behn v.
Burness,
8 B & S. p.
755.**

*286 The promise as to quality is then a warranty in the strict sense of the term, "a stipulation by way of agreement, for the breach of which compensation must be sought in damages," in other words, a promise to indemnify against failure to perform a term in the contract. (a)

(a) [The decisions in this country are not in harmony upon this question. The cases of *Kase v. John*, 10 Watts. (Pa.) 107; 298

CONDITIONAL PROMISES.

We now come to deal with conditional promises. Conditional Promises are and before we touch upon the sort of condition which is especially connected with the subject of discharge, it may be well to speak shortly of conditions in general.

If A makes a promise to X which is not an absolute promise, but subject to a condition, that condition must, as regards its relation to the promise in time, be either *subsequent*, *concurrent* or *precedent*.

In the case of a *condition subsequent*, the rights of Condition X under A's promise are determinable upon a specified event. The condition does not affect the commencement of X's rights, but its occurrence brings them to a conclusion. We have already dealt with conditions of this nature in speaking of the discharge See ante, of contract by agreement. p. 254.

In the case of a *condition concurrent*, the rights of Condition X under A's promise are dependent upon his doing, or being prepared to do, something simultaneously with the performance of his promise by A. Such a condition exists in the case of a sale of goods where no time is specified for the payment of the price; payment and delivery are concurrent conditions, and the right of the seller to receive the price, and that of the buyer to receive the goods are dependent upon the readiness of each, the one to deliver and the other to pay. Per Bayley, J., in Bloxam v. Sanders, 4 B. & C. 941. [Cornwall v. Haight, 8 Barb. 328.]

In the case of a condition precedent, the *287 Condition precedent,

Muller v. Eno, 14 N. Y. 597, and *Hoadley v. House*, 82 Vt. 179, holding that where there was an executed contract of sale of personal property, and a breach of warranty of quality, that if the article is of the kind bargained for, in the absence of fraud, the purchaser cannot return the article unless it has been expressly stipulated he may do so; but the courts of Massachusetts, in *Bryant v. Isburgh*, 18 Gray, 607, hold the contrary doctrine. But in all cases of fraud the sale may be rescinded and the article returned. *Holbrook v. Burt*, 22 Pick. 546; *Blyth v. Speake*, 23 Texas, 429.]

(1) which
do not
discharge.

rights of X under A's promise do not arise until something has been done, or has happened, or some period of time has elapsed. But in dealing with conditions of this nature we must note that they are of two kinds, and that with one of these we are not here immediately concerned.

Floating or
suspensory
conditions.

We must distinguish conditions which suspend the operation of a promise until they are fulfilled, from conditions the non-fulfillment of which is a cause of discharge. It is perhaps permissible to call the former *floating* conditions, as opposed to conditions the performance of which is fixed by time or circumstances. It may be well shortly to illustrate the character of such conditions.

The happen-
ing of an
event.

Morgan v.
Birnie, 9
Bing. 672.
[Smith v.
Briggs, 3
Denio, 73.]

A promise may be conditional on the happening of an uncertain event, as in the case of the underwriter whose liability accrues upon the loss of the vessel insured. Or it may depend upon the act of a third party, as in the case of a promise in a building contract to pay for the work upon receiving a certificate of approval from the architect. Such promises might be called *contingent* rather than *conditional*, for they depend for their operation on events which are beyond the control of the promisee, and which may never happen.

The lapse of
time.

Again, a promise may be conditional in the sense that its operation is postponed until the lapse of a certain time—as in the case of a debt for which a fixed period of credit is to be given—or until the happening of an event that is certain to happen, as in the case of an insurance upon life.

The act of the
promisee.

Or again, a promise may be conditional in the sense that its operation awaits the performance of some act to be done by the promisee. If no time is specified within which the act is to be done, the non-fulfillment of the condition merely suspends and does not dis-

charge the rights of the promisee. Common illustrations of such conditions are furnished by cases of promises conditional upon demand or notice.

A may promise X that he will do something *288 upon demand: he cannot then be sued until demand has been made. Or A may promise X that he will do something upon the happening of an event, and he may stipulate that notice shall be given to him of the event having happened. Or it may be that the happening of the event is peculiarly within the knowledge of X, and then an implied condition would be imported into the contract that notice must be given to A before he can be sued upon his promise.

Makin v.
Watkinson,
L.R. 6 Ex. 25.

In all these cases it would appear than an action brought upon the promise, before the fulfillment of the condition, would be brought prematurely; and though neither the non-fulfillment of the condition, Palmer v. nor the action brought before it was fulfilled, would discharge the contract, the condition suspends, according to its terms, the right to the performance of the promise.

Temple, 9 A.
& E. 521.

But the conditions with which we are concerned (2) Conditions prece-
effect a discharge of contract by their breach, if not performed at a fixed time or within a reasonable time from the making of the contract; and the breach of such a condition is the breach of a term expressly made, or necessarily implied in the contract, whereby one party loses either the whole or an essential part of that in consideration of which he made his promise.

And so we may say that where A's promise to X is a conditional and not an absolute promise, he may be discharged —

(1) By the failure of X to perform a "concurrent condition," *i. e.*, to do something or to be ready to do something which should be simultaneous with the performance of his promise by A.

(2) By the fact that there has been a total or substantial failure on the part of X to do that which he was bound to do under the contract—a state of things which we may describe as virtual failure of consideration.

*289 (3) By the untruth of some one statement or the breach of some one term which the parties considered to be vital to the contract.

Breach of Concurrent Condition.

Concurrent conditions are mutual conditions precedent.

Benjamin on Sales, p. 480.

we mean by the phrase is, that there must be a concurrent readiness and willingness to perform the two promises, and that if one is not able or willing to do his part, the other is discharged.

This form of condition is more particularly applicable to contracts of sale, where payment and delivery are assumed in the absence of express stipulation to be intended to be contemporaneous.

7 T. R. 125.

In *Morton v. Lamb* the plaintiff agreed to buy a certain quantity of corn of the defendant at a certain price, and the defendant promised to deliver the corn within one month. The plaintiff alleged that he had always been ready and willing to receive the corn, but that it had not been delivered within the month. The Court held that readiness to receive was not a sufficient performance of his obligation by the plaintiff; that payment of the price was intended to be concurrent with delivery of the corn. As the plaintiff did not allege that during the time in which delivery might have been made he had been ready to pay the price, there was nothing, as he had shaped his case, to show that he had not himself broken the contract and discharged the defendant by non-readiness to pay.

And so the law is laid down by BAYLEY, J., in *Bloxam v. Sanders*: "Where goods are sold, and 4 B. & C. 941. nothing is said as to the time of the delivery or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller *290 is liable to deliver them whenever they are demanded upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price."

Breach by Virtual Failure of Consideration.

It is laid down by high authority that "where mutual promises or covenants go to the *whole consideration* on both sides, they are mutual conditions and performance must be averred." Williams^s, Saunders, 1. 558.

By this we must understand that where A's promise is the entire consideration for X's promise, then, in the absence of any clear indication that X is to perform his promise first, or that X, as the consideration for his promise, relied solely upon his right of action against A, A will not be able to sue X unless he can aver that he has performed or is ready to perform his promise; and in the event of it being no longer possible for him to perform it within the terms of the contract, X will be discharged. Boone v. Eyre, 1 H. Bl. 273 n. [See People v. Glenn, 70 Ill. 232.]

It seems tolerably obvious that a total failure by A in performing that which was the entire consideration for X's promise, and which should have been antecedent to X's performance of his promise, will exonerate X; but it will be well to note some of the less obvious applications of the rule, and to mark its effect in cases where the performance of a promise has been illusory and consideration for the promise of the other party has consequently failed.

In cases of
executory
contract of
sale.

In every executory contract of sale the buyer, if he has contracted for an article of a particular quality, is entitled to reject the article tendered if it do not correspond in quality with the terms of the contract. This, however, is a matter of express condition falling

under the next and not the present head of conditional promises. But in the absence of express stipulations of this nature there are certain terms implied in every contract of sale which protect the buyer who has not been able to inspect the goods from the imposition upon him of an article different to that which he contracted to buy, or practically worthless and unmarketable.

Jones v. Just, "In every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specified description, but must also be saleable or merchantable under that description."

Where goods do not answer to description. Thus the buyer is not bound to accept goods which do not correspond to the description of the article sold, even though they do correspond to the sample by which they were bought.

10 Exch. 191. In *Nichols v. Godts* the plaintiff agreed to sell to the defendant a certain quantity of *foreign refined rape oil, warranted only equal to samples;* and the action was brought for the refusal by the defendant to accept oil which corresponded to the samples, but which turned out not to be *foreign refined rape oil.*

And see *Azemar v. Casella,* L. R. 2 C. P. 341 & livered was different from that which he had agreed to buy.

6 Taunt. 108. On the same principle, in *Laing v. Fidgeon* a contract to supply saddles was held to be discharged, and the purchaser exonerated from receiving the goods, on the ground that they were not of a merchantable quality.

In the case of an executed contract of sale, in which the property in the article sold has passed unconditionally to the buyer, there does not seem to be express authority to the effect that terms, thus imported into every contract of sale in which the buyer cannot inspect the goods, give a right to return the article bought.

In cases of
executed con-
tract of sale.
See Benja-
min on Sales,
[Perkins' ed.,
Sec. 88^a and
note a.]

But it would seem that if the article the property in which has passed to the buyer prove to be worthless and unmarketable, or different in character from that which he agreed to buy, he can exercise rights closely analogous with the right of return, and such as we have described as flowing from the discharge of contract by breach.

(1) He can defend an action successfully for the whole amount of the price.

(2) He can, if he has paid the price, recover it back, as money received to his use, on the principle explained above, that where a man has done all or any part of his share of a contract which is afterwards broken by the default of the other party, he may recover as upon a distinct contract arising upon the acceptance by the other of money, goods or services offered by him.

In *Poulton v. Lattimore*, the plaintiff sued the defendant for the price of seed; the seed had been sold as new growing seed, but when sown it proved wholly unproductive. The defendant refused to pay anything for the seed, and his defense was successful to the whole amount of the price.

In *Young v. Cole* the defendant employed the plaintiff as a stockbroker, and delivered to him some Guatemala bonds to sell. The plaintiff sold them and paid the price to the defendant. The bonds turned out to be worthless because unstamped, and were returned to the plaintiff, who took them back, repaid to the purchaser their price, and sued the defendant for the

amount which he had paid, as money received by the defendant for his use.

The Court held that he was entitled to recover inasmuch as the purchaser of the bonds was entitled to return them and demand their price back from the broker, and the plaintiff had thus been compelled to make the payment on behalf of the defendant. "It is not a question of warranty," said TINDAL, C. J., "but whether the defendant has not delivered something which, *though resembling the article contracted to be sold, is of no value.*"

It follows from what has been said that the

*293 buyer under the circumstances described may always maintain an action for damages sustained by the supply to him of an unmarketable article, or of something different in character to that which he agreed to buy. There needs no express term in the contract to enable him to do this.

It is somewhat unfortunate that the phrase "implied warranty" should have been used to describe terms of this nature. A non-compliance with such terms is, in fact, a breach of the entire contract, a substantial failure of consideration. If A agrees to buy beef of X, it seems hardly reasonable to say that X impliedly warrants that he will not supply mutton, or that he will not supply an article unfit for human food.

Per Lord Abinger, C. B. Chanter v. Hopkins, 4 M. & W. 309. The use of the term "warranty" in this sense has been emphatically condemned by eminent judges, but it still exists, and tends to obscure the subject of the performance and breach of contract.

Per Martin, B. Azemar v. Casella, L. R. 2 C.P. 677. In cases of divisible performance which we have described as capable of more or less complete performance, and which may be broken in part without such breach affecting the existence of the contract.

Where the performance of a promise is divisible so

that a partial breach will not discharge the other contracting party, a total failure of performance will nevertheless operate as a discharge.

It is possible therefore that a promise which is independent, so that a partial breach does not affect the contract, may, if wholly broken, change its character and become a condition. Thus in *Ritchie v. Atkinson*, 10 East, 295. cited above, it was admitted that though the failure to deliver a *complete* cargo did not exonerate the charterer, yet that if *no* cargo had been delivered he would Per Grose, J., at p. 309.

And so with a promise which the parties regard as a subsidiary term in the contract in so far as its exact performance is not a condition upon which *294 the rights of the promisor depend: if it be broken in such a way as to frustrate the objects of the contract, it operates as a condition and the breach of it as a discharge.

Jackson v.
Union
Marine In-
surance Co.,
L. R. 10 C. P.
p. 148.

Thus in *McAndrew v. Chapple*, cited above, the L. R. 1 C. P. 643. promise to use "all convenient speed" was held not to be a condition precedent to the rights of the ship owner. It was laid down that delay or deviation in sending out the ship did not exonerate the charterer from providing a cargo at the port of loading. But if it were "a delay or deviation which, as it has been said, goes to the whole root of the matter, deprives the charterer of the whole benefit of the contract," such L. R. 10 C. P. p. 48. delay or deviation would effect a discharge.

Conditions Precedent.

In the cases with which we have been dealing, one of the parties to a contract has been excused from performance of his promise by reason of the entire failure of the consideration which was to have been given for it. We now come to Conditions Precedent in the narrower and more frequent use of the word, as meaning

a single term in the contract, but a term possessing a particular character.

Condition
Precedent
defined.

We will define a Condition Precedent, in this sense, as a Statement or Promise, the untruth or non-performance of which discharges the contract.

The difficulty which has always arisen, and must needs continue to arise with regard to Conditions Precedent, consists in discovering whether or no the parties to a contract regarded a particular term as essential. If they did, the term is a Condition: its failure discharges the contract. If they did not, the term is a Warranty: its failure can only give rise to an action for such damages as have been sustained by the failure of that particular term.

Warranty and condition are alike parts, and only parts, of a contract consisting in various terms.

*295 We have tried to define Condition, we will venture further and try and define Warranty.

Warranty defined. Warranty is a more or less unqualified promise of indemnity against a failure in the performance of a term in the contract.

It is right to say that the word warranty is used in the most confusing manner, and in a great variety of senses,¹ but it is submitted that the definition which

¹ It would be a work of some research to enumerate the various senses in which the word *warranty* is used. The following are some of the commoner uses of the term:

(1) Warranty is used as equivalent to a condition precedent in the sense of a descriptive statement on the truth of which the rights of one of the parties depend. *Behn v. Burness*.

(2) It is used as equivalent to a condition precedent in the sense of a promise with the effect above described. *Behn v. Burness*.

(3) It is used as meaning a condition the breach of which has been acquiesced in, and which therefore forms a cause of action but does not create a discharge. *Behn v. Burness*.

(4) It is used as an independent subsidiary promise, collateral to the main object of the contract. *Chanter v. Hopkins*. This, it is submitted, is its legitimate meaning.

(5) In relation to the contract of sale, warranty is used for an

just been given assigns to the term its primary meaning. "A warranty is an express or implied statement of something which the party undertakes shall be part of the contract; and though part of the contract, collateral to the express object of it." *296

Per Lord Abinger, C.
B., in Chan-
ter v. Hop-
kins, 4 M. &
W. 404

The breach of a term which amounts to a warranty therefore will give a right of action, though it will not take away existing liabilities; it is a mere promise to indemnify.

We have called a warranty "a more or less unqualified promise;" and we will illustrate the meaning of this phrase from the contract between a Railway Company and its passengers. It is sometimes said that a Railway Company as a common carrier warrants the safety of a passenger's luggage, but does not warrant his punctual arrival at his destination in accordance with its time tables. In truth it warrants the one just as much as it warrants the other. In each case it makes a promise subsidiary to the entire contract, but in the

express promise that an article shall answer a particular standard of quality; and this promise is a condition until the sale is executed, a warranty after it is executed.

Street v. Blay,
2 B. & Ad.
450

(6) *Implied warranty* is a term used very often in such a sense as to amount to a repetition by implication of the express undertaking of one of the contracting parties. We have mentioned Ante, p. 291. the implied warranty in an executory contract of sale that goods shall answer to their specific description and be of a merchantable quality; in other words, that there shall be a substantial performance of a contract.

Implied warranty of title appears to be a somewhat vexed question: but the better opinion seems to be that on the sale of an article a man is supposed to undertake that he has a right to sell it; in other words, "that he sells a chattel and not a lawsuit."

Eicholz v.
Bannister, 17
C. B. N. S.
708

But the strangest applications of the implied warranty are the *warranty of authority* which an agent is supposed to give to a person contracting with him as agent, of which more hereafter; and the *warranty of possibility* which a man is said to give, if he omits to introduce into his promise conditions which guard him from being bound by it in the event of its becoming impossible of performance.

Collen v.
Wright, 7 E.
& B. 301; 8
E. & B. 647.
Clifford v.
Watts, L. R.
5 C. P. 577.

Richards v. London, Brighton & S.C. Railway Co., 7 C. B. 839. case of the luggage its promise is qualified only by the excepted risks incident to the contract of a common carrier, in the case of the time table its promise amounts to no more than an undertaking to use reasonable diligence to insure punctuality. A promise is not more or less of a warranty because a greater or less degree of diligence is exacted or undertaken in the performance of it.

Le Blanchev. L. & N. W. Railway Co., D. 311. That the promises are warranties, and not conditions is apparent from the fact that neither loss of luggage nor unpunctuality would entitle the passenger to rescind the contract and recover back his fare.

Difficulties of distinguishing condition and warranty.

The question whether a particular term in a contract is a Condition Precedent or a Warranty is one which, as it turns upon the construction of each individual contract, need not detain us longer here.

"The rule has been established," said TINDAL, C. J., 8 Bing. N. C. in *Stavers v. Curling*, "by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention when once discovered all technical forms of expression must give way."

And BLACKBURN, J., puts the matter in the same light in the recent case of *Bettini v. Gye*:
L. R. 1 Q. B. D. 187.

"Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of some importance and *prima facie* a condition precedent is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent."

This being the rule as to the ascertainment of a condition precedent, it will be enough to note that a condition precedent may assume the form either of a statement or of a promise. In speaking of Misrepresentation, we pointed out the mode in which statements forming the basis of a contract or regarded as essential to it were incorporated into the body of the contract, and were placed upon a level with promises the breach of which would confer a right of action, and in certain cases effect a discharge.

But it must be borne in mind that a condition precedent may change its character in the course of the performance of a contract; and that a breach which would have effected a discharge if treated as such at once by the promisee, ceases to be such if he goes on with the contract and takes a benefit under it.

This aspect of a condition precedent is pointed out by WILLIAMS, J., in *Behn v. Burness*, where he speaks of the right of the promisee, in the case of a broken condition, to repudiate the contract, "provided it has not already been partially executed in his favor;" and goes on to say that if after breach the promisee continues to accept performance, the condition loses its effect as such, and becomes a warranty in the sense that it can only be used as a means of recovering damages.

An illustration of such a change in the effect of a condition is afforded by the case of *Pust v. Dowie*.^{32 L. J. Q. B. 179, 235.} The defendant chartered the plaintiff's vessel for a voyage to Sydney, he promised to pay £1,550 in full for this use of the vessel on condition of her taking a cargo of not less than 1,000 tons weight and measurement. The charterer had the use of the vessel as agreed upon; but it appeared that she was not capable of holding so large a cargo as had been made a condition of the contract. To an action brought for non-

payment of the freight the defendant pleaded a breach of this condition. The term in the contract which has been described was held to have amounted, in its inception, to a condition. "It is not easy to see," said BLACKBURN, J., "what is meant by these latter words unless they import a condition in some sense; and if when the matter was still executory, the charterer had refused to put any goods on board, on the ground that the vessel was not of the capacity for which he had stipulated, I will not say that he might not have been justified in repudiating the contract altogether; and in that case the condition would have been a condition precedent in the full sense."

^{9 Exch. 709.}
See p. 285.

He then quotes with approval the *dicta* of WILLIAMS, J., in *Behn v. Burness*, and goes on to say, "No doubt that principle is adopted from the judgment of Lord WENSLEYDALE, in *Graves v. Legg*, and this distinction will explain many of the cases in which, although there appears to have been a condition precedent not performed, a party having received part of the consideration has been driven to his cross-action. Now is not this a case in which a substantial part of the consideration has been received? And to say that the failure of a single ton (which would be enough to support the plea) is to prevent the defendant from being compelled to pay anything at all, would be deciding contrary to the exception put in the case of *Behn v. Burness*."

but not if the breach be of a substantial character. But although the acceptance of a part performance subsequent to a breach of a condition precedent alters, as a general rule, the nature of such a condition and reduces it to the level of a subsidiary promise, there may be circumstances under which the condition retains its original character.

If such a performance as has been accepted be not "a substantial part of the consideration" the condi-

tion does not lose its force. In *Ellen v. Topp* action 6 Exch. 424. was brought by a master against the father of an apprentice upon an apprenticeship deed to which the father was a party, for a discontinuance of service by the apprentice. The apprentice had served for three years out of a term of five. The defendant pleaded that the plaintiff, having agreed to teach the apprentice three trades, had abandoned one of them. It was argued that as the plaintiff had given so much of the consideration as a three years' instruction of the apprentice, the condition that he should practice the three trades which he had originally promised to teach, had ceased to be a condition precedent and that the breach of it did not discharge the apprentice. The Court acknowledged the rule that "the construction of an instrument may be varied by matter *ex post facto*; and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less." But it was held that the failure to fulfill the condition, although some performance had since been accepted, was a failure to fulfill a substantial part of the consideration, that the covenant to teach was, in effect, a continuing condition precedent to the covenant to serve, *Ellen v. Topp*, 6 Exch. 424. and that, in consequence, the rule under discussion did not apply.

§ 3. REMEDIES FOR BREACH OF CONTRACT. *300

Having endeavored to ascertain the rules which govern the *discharge* of contract by breach, it remains to consider the remedies which are open to the person injured by the breach.

If the contract be *discharged* by the breach, the person injured acquires or may acquire, as we have seen, three distinct rights: (1) a right to be exonerated from further performance; (2) a right, if he has done anything under the contract to sue upon a *quantum*

meruit, a cause of action distinct from that arising out of the original contract, and based upon a new contract originating in the conduct of the parties; (3) a right of action upon the contract, or term of the contract broken.

But we are now no longer specially concerned with that breach of contract which amounts to a discharge: we may therefore consider generally what are the remedies open to a person who is injured by the breach of a contract made with him. They are of two kinds:

Damages. he may seek to obtain *damages* for the loss he has sustained; or he may seek to obtain *specific performance* of the contract which the other party has refused or neglected to perform.

Specific performance. But there is this difference between the two remedies: every breach of contract entitles the injured party to *damages*, though they be but nominal; but it is only in the case of certain contracts and under certain circumstances that *specific performance* can be obtained.

We do not propose to treat of these remedies otherwise than in the most general way, for the matter is one which barely comes within the scope of this work; but it may be well to state briefly some elementary rules which govern the two remedies in question.

*301

Damages.

When a contract is broken and action is brought upon it—the damages being unliquidated, that is to say unascertained in the terms of the contract—how are we to arrive at the amount which the plaintiff, if successful, is entitled to recover?

Per Parke, B., Robinson v. Harman,¹ Ex. 855. (1) "The rule of Common Law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the

same situation, with respect to damages, as if the contract had been performed." Pinkston v. Huie, 9 Ala. 252.]

Thus where no loss accrues from the breach of contract, the plaintiff is nevertheless entitled to a verdict, but for nominal damages only, and "nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity." And so in action for the non-payment of a debt, where there is no promise to pay interest upon the debt, nothing more than the sum due can be recovered; for the possible loss arising to the creditor from being kept out of his money is not allowed to enter into the consideration of the jury in assessing damages, unless it was expressly stated at the time of the loan to be within the contemplation of the parties. (a)

(2) The rule laid down by PARKE, B., in *Robinson* so far as it v. *Harman*, must be taken subject to considerable limitations in practice. The breach of a contract may result in losses which neither party contemplated, or could contemplate at the time that the contract was entered into, and the Courts have striven to lay down rules by which the limit of damages may be ascertained.

So in *Hadley v. Baxendale* it was decided *302 9 Exch. 854. that "where two parties have made a contract [See *Messmore v. New which one of them has broken, the damages which the York Shot the other party ought to receive in respect of such Co., 40 N. Y. 422.]* breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e. according to the usual course of things, from such breach of the contract itself, or such as may reasonably be supposed to have been in contemplation of both

(a) [In this country the statutes of the States cover all the questions of interest.]

parties, at the time they made the contract, as the probable result of the breach of it. (a)

Exceptional loss should be matter of special terms. And where special loss is in contemplation of the parties from the breach of the contract, such loss as would not, in the ordinary course of things, follow upon the breach, it is not enough that the loss should

Per Blackburn, J., in Horne v. Midland Railway Co. be in contemplation of the parties in order that it may be recovered as damages, there must be "evidence of an actual contract to bear the exceptional loss arising from breach of contract."

L. R. 8 C. P. 131. In *Horne v. Midland Railway Company*, the plaintiff being under a contract to deliver shoes in London at an unusually high price by a particular day, delivered them to the defendant to be carried, with notice of the contract only as to the date of delivery. The shoes were delayed in carriage, were consequently rejected by the intending purchasers, and the plaintiff sought to recover, besides the ordinary loss for delay, the difference between the price at which the shoes were actually sold and that at which they would have been sold if they had been punctually carried. It was held that these damages were not recoverable, in the absence of any evidence that the Company undertook

(a) [There is a difference of opinion in the American courts upon the proper measure of damages in cases of breach of the contract of warranty. The Supreme Court of Alabama, in the recent case of *Herring v. Skaggs*, 2 Southern L. Journal, 291, which was a case where a safe warranted burglar proof had been broken into and valuables stolen, holding that the measure of damages was the difference between the value of the safe, as it was, and what it would have been worth if as warranted, and that no recovery could be had for the loss of the articles taken from it. The cases of *Parsinger v. Thorburn*, 34 N. Y. 634, and *Flick v. Wellerton*, 20 Wis. 390, hold that when seed was sold as being of a certain kind and quality, and was not so, the value of the crop which would have been raised, less the expense of production, was the proper measure of damages, and not merely the difference between good and worthless seed.]

the increased responsibility arising from the unusual price.

(3) Damages in an action for breach of contract are damages for breach of contract not vindictive. Hence a plaintiff can never recover more than such pecuniary loss as he has sustained, subject to the above rules. To this general rule, however, the breach of promise of marriage is an exception, for in such cases the feelings of the person injured are taken into account, apart from such specific pecuniary loss as can be shown to have arisen.

*303 *Hamlin v. Great Northern Railway Co.* 1 H. & N. 408. [See *Goodall v. Thurman*, 1 Head, 209.]

(4) The parties to a contract not unfrequently assess the damages at which they rate a breach of the contract by one or both of them, and introduce their assessment into the terms of the contract. Under these circumstances arises the distinction between penalty and liquidated damages, which we have already dealt with in considering the construction of contracts. See p. 243.

(5) It follows from the general rule laid down by Baron PARKE, that a difficulty in assessing damages can in no way disentitle a plaintiff from having an attempt made to assess them.

A manufacturer was in the habit of sending specimens of his goods for exhibition to agricultural shows, and he made a profit by the practice. He entrusted some such goods to a railway company, who promised the plaintiff, under circumstances which should have brought his object to their notice, to deliver the goods at a certain town on a fixed day. The goods were not delivered at the time fixed, and consequently were late for a show at which they would have been exhibited. It was held that though the ascertainment of damages was difficult and speculative, its difficulty was no reason for not giving any damages at all.

And further, the plaintiff is entitled to recover for prospective loss arising from a refusal by the defendant to perform a contract by which the plaintiff would have profited. Thus where a contract was made for the supply of coal by the defendants to the plaintiff by monthly installments, and breach occurred and action was brought before the last installment fell due, it was held that the damages must be calculated to be the difference between the contract price and the market price at the date when each installment should

have been delivered, and that the loss arising

Roper v. Johnson, L.R. 8 C.P. 107. *304 from the non-delivery of the last installment must be calculated upon that basis, although the time for its delivery had not arrived.

Specific Performance.

Jurisdiction of Chancery, as to specific performance. The jurisdiction, once exclusively possessed by the Court of Chancery, to compel performance of a promise, supplemented the remedy offered by the Common Law Courts, which was often inadequate or inapplicable to the loss sustained.

A promise to do a thing can be enforced by a decree for specific performance, a promise to forbear by an injunction.

How limited. The exercise of this jurisdiction by the Court of Chancery was limited by several rules, some of which have been already noticed. Defects in the formation

Kekewich v. Manning, 1 D. M. & G. 176. of a contract afforded an answer to a claim for specific performance, and in some cases Equity was more

Flight v. Boland, 4 Russ. 298. guarded than the Common Law in granting its remedy to suitors. A gratuitous promise though under

v. Cord. 2 Har. & G. 100.] Black seal cannot be enforced in Equity, nor can an infant obtain specific performance of a contract which cannot

be enforced against him.

But the substantial limitations on the employment of the remedy were these:

The Courts will not decree specific performance—

1. Where the Common Law remedy of damages is adequate to the loss sustained.
2. Where the matter of the contract is such that the Courts cannot supervise its execution.

(1) The first of these rules is illustrated by the different attitude which the Court has assumed in this matter towards contracts for the sale of land and contracts for the sale of goods.

The objects with which a man purchases a particular piece of land are different to those with which he purchases goods. He may be determined, in making the contract, by the merits of the site or its neighborhood, and these cannot be represented by a money compensation; whereas goods of the kind and quality that he wants are generally to be purchased. Hence specific performance of a contract for the sale of goods is only decreed in the case of specific chattels the value of which, either from their beauty, and the interest attaching to them, or some other cause, cannot be represented by damages. (a)

(2) And the distinction drawn between land and goods illustrates the second rule also.

An agreement for the purchase of land can be performed by the doing of a specific act, the execution of a deed or conveyance. In a contract for the sale and delivery of goods performance may extend over some time and involve the fulfillment of various terms, and "The Court acts only where it can perform the very thing in the terms specifically agreed upon."

But the second rule is more distinctly illustrated by the refusal of the Courts to grant specific performance of contracts involving personal services; though it

(a) [Some of the American Courts seem disposed to be more liberal in granting specific performance of contracts relating to personality. See *Barr v. Lapley*, 1 Wheat. 151; *Mechanics' Bank of Alexandria v. Seton*, 1 Pet. 290; *Clark v. Flint*, 22 Pick. 231.]

will enforce by injunction a promise not to act in a particular way.

1 D. M. & G. 614. [See *Rivofinoli v. Corsetti*, 4 Paige, 264.] Thus in *Lumley v. Wagner*, the defendant agreed with the plaintiff to sing at his theatre upon certain terms, and during a certain period to sing nowhere else. Subsequently she entered into an engagement with another person to sing at another theatre, and refused to perform her contract with the plaintiff.

The Court declined to enforce so much of the contract as related to the promise to sing at the plaintiff's theatre, but it restrained the defendant by injunction from singing elsewhere.

*306 § 4. DISCHARGE OF RIGHT OF ACTION ARISING FROM BREACH OF CONTRACT.

Discharge of right of action, The right arising from a breach of contract can only be discharged in one of three ways:

- (a) By the consent of the parties.
- (b) By the judgment of a Court of competent jurisdiction.
- (c) By lapse of time.

(a) Discharge by consent of the parties.

This may take place either by Release or by Accord and Satisfaction; and the distinction between these two modes of discharge brings us back to the elementary rule of contract, that a promise made without Consideration must, in order to be binding, be made under seal. A Release is a waiver, by the person entitled, of a right of action accruing to him from a breach of a promise made to him.

In order that such a waiver should bind the person making it, it is necessary that it should be made under seal; otherwise it would be nothing more than a promise, given without consideration, to forbear from the exercise of a right.

To this rule bills of exchange and promissory notes

form an exception. We have already seen that these *Ante*, p. 249. instruments admit of a parol waiver before they fall due. It appears to be correct to say that the right of *Byles on Bills*, 12th action arising upon a bill or note can be discharged by *ed.*, 198. express, though gratuitous, renunciation.

Accord and Satisfaction is an agreement, which need by Accord and Satisfaction not be by deed, the effect of which is to discharge the right of action possessed by one of the parties to the agreement. But in order to have this effect it is not merely necessary that there should be consideration for the promise of the party entitled to sue, but that the consideration should be Bayley v. Homan, 3 *Bing. N. C.* executed in his favor. Otherwise the agreement is an *accord without a satisfaction*. The promisor must at p. 920. have obtained what he bargained for in lieu of his [Brooklyn *Bank v. De Grauw*, 28 *Wend. 842.*] right of action, and he must have obtained something more than a mere fresh arrangement as to the payment or discharge of the existing liability. *McManus v. Bark, L. R. 5 Exch. 65.*

The *satisfaction* may consist in the acquisition of a new right against the debtor, as the receipt from him of a negotiable instrument in lieu of payment; or of new rights against the debtor and third parties, as in the case of a composition with creditors; or of something different in kind to that which the debtor was bound by the original contract to perform; but it must have been taken by the creditor as *satisfaction* See *S. L. C. i. 851*, note to for his claim in order to operate as a valid discharge. *Cumber v. Wane, and cases there cited.* [Babcock v. Hawkins, 23 Vt. 561.]

(b) *Discharge by the judgment of a court of competent jurisdiction.*

The judgment of a Court of competent jurisdiction See ch. v. a. 1. in the plaintiff's favor discharges the right of action arising from breach of contract. The right is thereby See *ch. v. a. 1.* merged in the more solemn form of obligation which *[Warren v. McNulty, 2 Gilm. 355.]* we have described as a Contract of Record.

The result of legal proceedings taken upon a broken contract may thus be summarized:

the creditor from the property of his debtor by the process of *execution*.

(c) *Lapse of Time.*

Except by express statutory provision, lapse of time does not affect the rights of parties to contracts. The rights arising from contract are of a permanent and indestructible character, unless either from the nature of the contract, or from its terms, it be limited in point of duration.

But though the rights arising from contract are of this permanent character, the remedies arising from their violation are, by various statutory provisions, withdrawn after a certain lapse of time. The remedies are barred, though the rights are not extinguished. (a)

These are the only matters which hinder the Statutes of Limitation from affecting the plaintiff's remedy. Neither ignorance that a right of action existed, nor, so far as Common Law goes, the concealment of the cause of action by fraud, will prevent the plaintiff from losing his remedy by lapse of time: nor, again, will the operation of the Statute be affected by a disability arising after the period of limitation has begun to run.

But in cases where there has been a fraudulent concealment of the existence of a cause of action, Equity dates the commencement of the statutory period from the discovery of the fraud.

(a) [The time in which actions of various kinds are barred depends entirely on the statutes of the different States, and the disabilities which prevent the statute from commencing to run vary very much, so that the student must examine this question either in the statutes or in some work on that special subject; but as a general thing the statute will not begin to run while the defendant is absent from the State or the plaintiff is unable to sue by reason of personal disability, as in cases of lunacy or minority.]

Revival of
right of
action.

It is possible that Statutes of Limitation may be so framed as not merely to bar the remedy, but to extinguish the right: such is the case with regard to realty under 3 and 4 Will. IV. c. 27, but as regards contract the remedy barred by the Statutes of Limitation may be revived in certain ways.

In case of
specialty.
[Ames v. Le
Rue, 2 Mc-
Lean, 216.]

Where a specialty contract results in a money debt, the right of action may be revived for the statutory period of limitation, (1) by an acknowledgment of the debt in writing, signed by the party liable, or his agent; or (2) by part payment, or part satisfaction on account of any principal or interest due on such a specialty debt. Such a payment, if made by the agent of the party liable, will have the effect of reviving the claim.

8 & 4 Will.
IV. c. 42, s. 5.
Of simple
contract.
[Keener v.
Crull, 19 Ill.
189.]

Where a simple contract has resulted in a money debt, the right of action may also be revived by subsequent acknowledgment or promise.

By promise.

*311 The sort of acknowledgment or promise which has been held to be requisite in order that a simple contract debt may be revived for another period of six years, is thus described by MELLISH, L. J.:

In re River
Steamer Co.,
L. R. 6 Ch.
828. [Porter
v. Hill, 4
Greenl. 41.]

"There must be one of three things to take the case out of the Statute (of Limitation). Either there must be an acknowledgment of the debt from which a promise to pay is implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed."

Per Cleasby,
B., in Skeet
v. Lindsay, L.
R. 2 Ex. D.
817. [Carroll
v. Forsyth, 69
Ill. 127.]

This being the principle, its application in every case must turn on questions of construction of the words of the alleged promisor. And as was remarked

"When the question is, what effect is to be given to particular words, little assistance can be derived from the effect given to other words in applying a principle which is admitted."

The debt, however, admits of revival in another
324

mode than by express acknowledgment or promise. A part payment, or payment on account of the principal, By payment. or a payment of interest upon the debt will take the contract out of the Statute of Limitation. But the payment must be made with reference to the original Waters v. debt, and in such a manner as to amount to an <sup>Tompkins. 2
C. M. R. 723.</sup> acknowledgment of it.

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CHAPTER IV.

IMPOSSIBILITY OF PERFORMANCE.

IMPOSSIBILITY of performance arising subsequently to the formation of the contract will, in certain cases, operate as a discharge. But before proceeding to consider and classify these cases, it may be well to say something as to Impossibility in general in its relation to contracts.

Unreality of consideration.

Obvious physical impossibility, or legal impossibility which is apparent upon the face of the promise, avoids the contract, because, as we have seen,¹ the promise is an *unreal consideration* for any promise given in respect of it.

Mistake.
Strickland v.
Turner, 7
Exch. 217.

Impossibility which arises from the non-existence of the subject matter of the contract avoids it, as we have seen,² on the ground of *mistake*; but there are two cases of this sort which, if reconcilable at all, are reconcilable only by a very fine distinction.

The distinction, if worth anything, seems to come to this: If a man makes a promise to do some act, and the possibility of his doing it is dependent on the existence of some thing or state of circumstances, he must make his promise conditionally or he will be bound in any event. But if two parties agree to purchase or otherwise deal with a thing which turns out to be non-existent, then, in the absence of any expressions to show that the promise of either was unconditional, they will be taken, if the thing be non-existent, to have contracted under mistake.

The facts of the two cases are these.

¹ See page 74. ² See page 121.

In *Hills v. Sughrue*, the defendant agreed with the plaintiff by charter-party to take his (the defendant's) ship to the island of Ichaboe and there load a complete cargo of guano and return with it to England, being paid a high rate of freight. There was so little guano at Ichaboe that the performance of the defendant's promise to load a complete cargo was impossible. The plaintiff sued him for damages for failure to bring home a cargo, and was held to be entitled to recover; the impossibility of performance being no answer to an absolute promise such as the defendant had made.

On the other hand, in *Clifford v. Watts*, the plaintiff and defendant were landlord and tenant, and the plaintiff sued upon a covenant in the lease in which the defendant undertook to dig from the premises not less than 1,000 tons of potter's clay annually, paying a royalty of 2*s.* 6*d.* per ton. The defendant pleaded that there never had been so much as 1,000 tons of clay under the land. The court held that the plea furnished a good answer to the plaintiff's claim. "Here," said BRETT, J., "both parties might well have supposed that there was clay under the land. *They agree on the assumption that it is there; and the covenant is applicable only if there be clay.*"

It is possible that the cases might be distinguishable on the ground suggested above, but it is noticeable that the Judges in the Court of Common Pleas, in distinguishing *Hill v. Sughrue* from *Clifford v. Watts*, curiously misapprehended the points of the earlier case;¹ and this makes the fine distinction which we have tried to draw somewhat unsatisfactory.

¹ It is clear from the language of WILLES, J., at p. 586, and of BRETT, J., at p. 589, that they thought the action in *Hills v. Sughrue* was brought by the shipowner against the charterer for not furnishing a cargo, whereas it was brought by the charterer against the owner for not loading a cargo which the owner, con-

Subsequent
impossi-
bility no
excuse.

*314 We now come to deal with Impossibility arising subsequent to the Formation of the Contract; and we may lay it down as a general rule that whether or no such impossibility originates in the default of the promisor, he will not thereby be excused from performance.

We have already dealt with what are termed "conditions subsequent," or "excepted risks," and what was then said may serve to explain the rule now laid down. If the promisor make the performance of his promise conditional upon its continued possibility, the promisee takes the risk: in the event of performance becoming impossible, the promisee must bear the loss. If the promisor makes his promise unconditionally, he takes the risk of being held liable even though performance should become impossible by circumstances beyond his control.

Aleyn, 26.
[See *contra*,
Bayley v.
Lawrence, 1
Bay, 499.]

An old case, *Paradine v. Jane*, illustrates the law upon this subject briefly and perspicuously:

The plaintiff sued for rent due upon a lease. The defendant pleaded "that a certain German prince, by name Prince Rupert, an alien born, enemy to the king and his kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession.... whereby he could not take the profits." The plea then was in substance that the rent was not due, because the lessee had been de-

trary to the ordinary practice in charter-parties, undertook to do (see *dicta* of PARKE, B., 15 M. & W. 258-9). There is a great difference between a man promising to go and bring home a thing which proves to be non-existent, and a man promising that, if another will let out his ship on certain terms, he will enable him to earn freight by loading a cargo which, when the ship is sent, proves to be non-existent. The writer cannot but think that the Court of Common Pleas unintentionally decided contrary to *Hill v. Sughrue*.

prived by events beyond his control of the profits from which the rent should have come.

But the court held that this was no excuse; "and this difference was taken, that where the law creates a duty or charge and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in *315 the case of Waste, if a house be destroyed by tempest, or by enemies, the lessee is excused.... But when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident or inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it." [Phillips v. Stevens, 10 Mass. 238.]

This being the general rule of law, we must now note a group of exceptions to it. And these must be distinguished from cases in which the Act of God is said to excuse from non-performance of a contract; for this use of the term "Act of God" has been condemned by high authority.

There are, as we have seen, certain contracts into which the Act of God is introduced as an express, or, by custom, an implied condition subsequent absolving the promisor. But there are forms of impossibility which are said to excuse from performance because "they are not within the contract;" that is to say, that neither party can reasonably be supposed to have contemplated their occurrence, so that the promisor neither excepts them specifically, nor promises unconditionally in respect of them.

We will deal with them *seriatim*.

(1) *Legal impossibility arising from a change in Except the law of our own country exonerates the promisor.* where there be change of the law.

In *Baily v. De Crespigny*, the plaintiff was lessee

L. R. 4 Q. B. to the defendant for a term of 89 years of a plot of land; the defendant retained the adjoining land, and covenanted that neither he nor his assigns would, during the term, erect any but ornamental buildings on a certain paddock fronting the demised premises. A Railway Company, acting under parliamentary powers, took the paddock compulsorily, and built a station upon it. The plaintiff sued the defendant upon the covenant: it was held that he was excused from the observance of his covenant by

Spencer's
case, 5 Co.
Lip. 15.

*316 an impossibility arising from the action of the Legislature. "The word 'assigns' is a term of well-known signification, comprehending all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent or act of law. The defendant when he contracted used the general word 'assigns,' knowing that it had a definite meaning; and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted. The Legislature, by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties."

Destruction
of subject-
matter.

(2) *Where the continued existence of a specific thing is essential to the performance of the contract, its destruction, from no default of either party, operates as a discharge.*

3 B. & S. 826. The leading case upon this subject is *Taylor v. Caldwell*. There the defendant agreed to let the plaintiff have the use of a Music Hall for the purpose of giving concerts upon certain days: before the days of performance arrived the Music Hall was destroyed by

fire, and the plaintiff sued the defendant for losses arising from the consequent breach of contract.

The court held that, in the absence of any express stipulation on the matter, the parties must be taken "to have contemplated the continuing existence" of at p. 838. the Music Hall "as the foundation of what was to be done;" and that therefore, "in the absence of any express or implied stipulation that the thing shall exist, *the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.*" *317

It will be observed that in this case the Court introduces an "implied condition" into the contract, that the subject matter of it shall continue to exist; whereas in the later case quoted above, express note is taken of the fact that the impossibility is "not within the contract," and has not been made the subject of any condition; and this, it is submitted, is a more satisfactory interpretation of the rule than to introduce a term into the contract which was never present to the mind of either party to it.

(3) *A contract which has for its object the rendering of personal services is discharged by the death or incapacitating illness of the promisor.*

In *Robinson v. Davison*, an action was brought for L. R. 6 Exch. damage sustained by a breach of contract on the part ^{269.} of an eminent pianoforte player, who having promised to perform at a concert, was prevented from doing so by dangerous illness.

The law governing the case was thus laid down by BRAMWELL, B.: "This is a contract to perform a service which no deputy could perform, and which, in case of death, could not be performed by the executors

of the deceased; and I am of opinion that, by virtue of the terms of the original bargain, incapacity of body or mind in the performer, without default on his or her part, is an excuse for non-performance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so; and as they have been silent on that point the contract must, in my judgment, be taken to have been conditional and not absolute.

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CHAPTER V.

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DISCHARGE OF CONTRACT BY OPERATION OF LAW.

THERE are rules of law which, operating upon certain sets of circumstances will bring about the discharge of a contract, and these we will briefly consider.

Merger.

The acceptance of a higher security in place of a Merger lower, that is to say, a security which in the eye of the law is inferior in operative power, *ipso facto*, and apart from the intention of the parties, merges or extinguishes the lower.

We have already seen an instance of this in the case See p. 307. of judgment recovered, which extinguishes by *merger* the right of action arising from breach of contract.

And, in like manner, if two parties to a simple contract embody its contents in a deed which they both execute, the simple contract is thereby discharged.

The rules governing this process may be thus summarized:

(a) The two securities must be different in their legal operation, the one of a higher efficacy than the other. Higgen's case, 6 Co. A second security taken in addition to one similar in Rep. 45 b. character will not effect its validity, unless there be discharge by substituted agreement.

(b) The subject matter of the two securities must be Holmes v. identical. Bell, 8 M. & G. 213.

(c) The parties must be the same.

Alteration of a Written Instrument. *319

If a deed or contract in writing be altered by ad- Rules as to
333 alteration,

dition or erasure, it is discharged, subject to the following rules:

Pattinson v. Luckily, L. R. 10 Ex. 330. (a) The alteration must be made by a party to the contract, or by a stranger while in his possession and for his benefit [and with his knowledge or consent.] (a)

Wilkinson v. Johnson, 3 B. & C. 428. Alteration by accident or mistake occurring under such circumstance as to negative the idea of intention will not invalidate the document.

(b) The alteration must be made without the consent of the other party, else it would operate as a new agreement.

(c) The alteration must be made in a material part. What amounts to a material alteration must needs depend upon the character of the instrument. But the general principle seems to be this, that a man "is discharged from his liability, if the altered instrument, supposing it to be genuine, would operate differently to the original instrument, whether the alteration be or be not to his prejudice."

Per Curiam in Gardner v. Walsh, 5 E. & B. 89.

or loss. The loss of a written instrument only affects the rights of the parties in so far as it occasions a difficulty of proof; but an exception to this rule exists in the case of bills of exchange and promissory notes.

Hansard v. Robinson, 7 B. & C. 90; Confians Quarry Co. v. Parker, L. R. 3 C. P. 1. If the holder of the instrument lose it, he loses his rights under it, unless he offer to the party primarily liable upon it an indemnity against possible claims.

Bankruptcy.

Bankruptcy effects a statutory release from debts and liabilities provable under the bankruptcy, when the bankrupt has obtained from the Court an order of discharge. It is sufficient to call attention to this mode of discharge, without entering into a discussion as to the nature and effects of Bankruptcy, or the provisions of the Bankruptcy Act of 1869.

c. 71. (a) [*Nichols v. Johnson*, 10 Conn. 192; *Rees v. Overbaugh*, 6 Cow. 746; *Lewis v. Payne*, 8 Cow. 71; *Medlin v. Platt Co.*, 8 Mo. 235; *Davis v. Carlisle*, 6 Ala. 607.]

APPENDIX A.

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CONTRACT AND QUASI CONTRACT.

It is necessary to touch briefly upon certain kinds of legal obligation which, for want of a better name, we call Quasi Contract, and which have been invested with the form of a fictitious or implied agreement. In dealing with Form and Consideration we mentioned that it appears as though both in English and Roman law we found the rudiments of Contract to originate in the same sources:

(1) A Formal Promise, the *Stipulatio*¹ in Roman, the Deed in English law, seems to be the only mode in which parties can bind themselves where the subject matter of agreement is wholly future or executory.

(2) An informal acquisition of benefit by one party at the expense of another, creating a liability to make a return, seems to be at the root of the contract *Re* in Roman law, and the contract arising upon executed consideration in English law.

It is not improbable that the relation which we call

¹ The History of Formal Contract seems still obscure, but, so far as the *Stipulatio* is concerned, Mr. Hunter in his "Exposition of Roman Law" has proved almost conclusively that it does not originate in the *Mancipatio*; in other words that Conveyance is not the parent of every kind of contract. In fact the arguments of Mr. Hunter go far to show that the Formal binding promise originated in Treaty rather than Sale, in those international relations of families described by Sir Henry Maine as *Ancient Law*, listing when the family was the unit of society: in those covenants affirmed by oath, of which the Book of Genesis offers frequent and familiar examples.

Leake on
Contract, p.
75.

quasi contract, or "contract implied in law," and the genuine contract arising upon consideration *322 executed, sprang alike from this notion of the readjustment of proprietary rights. It may well be that the idea of Agreement expressed in proposal and acceptance was not applied at first to that which we now call contract arising upon consideration executed, and that such genuine contracts were only by degrees disentangled from quasi contract. A passage in Gaius points to the blending of the two conceptions. After illustrating the nature of the contract *Re*, by the instance of *Mutuum* or loan for consumption, he goes on to say, "*is qui non debitum accepit ab eo qui per errorem solvit, re obligatur.*"¹ It is true that he immediately points out the difference in character between the two obligations; but it is significant that they were regarded as so nearly allied. And the application in English law of the action of Debt indicates a similar connection, in early law, of the two sources of liability.

But it is the change of remedy in English law from Debt to Assumpsit, more than this possible community of origin with certain forms of true contract, which has invested the "contract implied in law" with so much of the outward aspect of Agreement.

Debt was the remedy for cases of breach of contract upon consideration executed, where such a breach resulted in a liquidated or ascertained money claim: and later, this action came to be applied to any breach of contract resulting in a similar claim. And Debt was also the remedy in cases where statute, common law, or custom laid a duty upon one to pay an ascertained sum to another.

The action of Assumpsit was primarily an action to

¹ By the time of Justinian this legal relation had been definitely assigned to the province of Quasi Contract. *Institutes* iii. 27, 6.

See authori-
ties collected
in Pollock
on Contract,
pp. 125, 6.

Comyns,
Digest, tit.
Dett.

recover an unliquidated sum, or such damages as the breach of a promise had occasioned to the promisee, and it was in the first instance inapplicable to legal liabilities arising otherwise than upon a contract springing from mutual promises.

But there were certain inconveniences attaching to the action of *Debt*. It admitted of the *323 employment by the defendant of a mode of defense termed "Wager of law." This determined the result of the action, not upon the merits, but by a process of compurgation; in which the defendant came into Court and declared upon oath that he did not owe the debt, and eleven respectable neighbors also declared upon oath that they believed him to speak the truth. Again, the technical rules of pleading made it impossible to include in the same suit an action of debt and an action of *assumpsit*, an action for liquidated and one for unliquidated damages, inasmuch as the one was based upon contract real or feigned, the other upon a form of wrong, the *non-feazance* of an undertaking.

And so the history of pleading in relation to contract is in great part the history of the encroachment of the action of *Assumpsit* upon the field of the action of *Debt*.

It was for some time doubtful whether *assumpsit* would lie where the action was brought upon a breach of contract resulting in a liquidated claim; for a debt rather than for damages. But it was decided in *Slade's case* 4 Co. Rep. 92. that an action of *assumpsit* would lie though the contract resulted in a liquidated claim.

The next step was this: where the breach of a contract resulted in a liquidated claim, the pleadings in the action of *assumpsit* were reduced to a short statement of a debt originating in a request by the defendant, and a promise by him to pay. This was still almost a novelty in the reign of Anne. Henceforth the action of *assumpsit* possessed great practical con-

in Hayes v. Warren,
2 Str. 933. venience. It enabled claims arising from contract to be variously stated in the same suit, in the form of a special agreement which had been broken, and in the form of a debt resulting from an agreement and consequently importing a promise to pay it.

Such a mode of pleading was called an *indebitatus* count, or count in *indebitatus assumpsit*; the remedy upon a special contract which resulted in a *324 liquidated claim was now capable of being reduced to the shape of an action for debt with the addition of a promise to pay it. In this form it came to be applied to those kinds of legal liability which had given rise to the action of Debt, though devoid of the element of agreement, and thence to all cases where A was liable to make good to X a sum gained at X's expense.

**Moses v.
 Macferlan,
 2 Burr, 1008.**

The legal liability thus clothed in the form of contract, cannot be omitted from the treatment of our subject if only for the sake of distinguishing feigned from true Proposal and Acceptance. For the convenience of the remedy certain legal liabilities have been made to figure as though they sprang from contract, and have appropriated the form of Agreement. It is enough to say, as regards the later history of the 15 & 16 Vict. subject, that the Common Law Procedure Act of 1852 c. 76. practically abolished the distinction between Assumpsit and Debt, by making it no longer needful that a plaintiff should specify the form in which his action is brought, by allowing the joinder of various forms of action in the same suit, and by providing for the omission of the feigned promise from the statement of the cause of action. The form of pleading, in such cases as resolved themselves into a simple money claim, was reduced to a short statement of a debt due for money paid or received; and now the Judicature Act requires "that every pleading shall contain a statement of the material facts upon which the party

Order 19, 4.

pleading relics;" and thus merely formal pleadings are abolished.

Nevertheless, although the form no longer exists, the legal relations of the parties remain unchanged, and the obligation to which the action of *Assumpsit* conveyed a false air of agreement continues to furnish a cause of action, though that cause of action is now to be stated as it really exists.

It is rather in deference to its historical connection with contract, than to actual propriety of arrangement, that we briefly notice the kinds of legal relation which once, in the pleader's hands, wore the semblance of proposal and acceptance.

The liability of which we speak may arise *325 from the judgment of a court of competent jurisdiction, or from the acts of the parties.

As to the former, it is enough to say that the judgment of a court of competent jurisdiction, ordering a sum of money to be paid by one of two parties to another, is not merely enforceable by the process of the court, but can be sued upon as creating a debt between Williams v. the parties, whether or no the court be a Court of Jones, 23 M. & W. 628. Record.

The acts of the parties may bring about this obligation either (1) from the admission by one of a claim due to the other upon an account stated, or (2) from the payment by one of a sum which the other ought to have paid, or (3) from the acquisition by one of money which should belong to the other.

(1) An account stated is an admission by one party Account who is in account with another that there is a balance stated. Irving v. due from him. The admission that a balance is due Veitch, 8 M. imports a promise to pay upon request, which may & W. 106. be sued upon as though it created a liability *ex contractu.* Hopkins v. Logan, 5 M. & W. 241.

(2) It is a rule of English law that no man "can Per Willes, make himself the creditor of another by paying that J., in John. son v. Royal

Mail Steam Packet Co., L. R. other's debt against his will or without his consent." (a)

3 C. P. 43. But if A requests or allows X to assume such a position that X may be compelled by law to discharge A's legal liabilities, the law imports a request and promise made by A to X, a request to make the payment, and a promise to repay.

The payment by one of several co-debtors of the entirety of the debt will entitle him to recover from each of the others his proportionate share. In such a case a request to pay and a promise to repay were feigned in order to bring plaintiff within the remedy of *assumpsit*, and he could recover his payment from his co-debtors as money paid to their use.

Kemp v.
Findon, 13
M. & W. 428.

*326 And in like manner a lodger, who has paid the rent of his landlord under a threatened distress of his goods, may recover the amount which he has thus been compelled to pay.

Exall v.
Partridge,
8 T. R. 208.

But legal liability incurred by X on behalf of A without any concurrence or privity on the part of A, will not entitle X to recover for money which under such circumstances he may pay to A's use. The liability must have been in some manner cast upon X by A. Otherwise the mere fact that X *has paid* under compulsion of law what A *might have been* compelled to pay, will give to X no right of action against A. X may have been acting for his own benefit and not in consequence of any request or act of A.

For instance, X was entitled under a bill of sale to seize A's goods; he did so, but left them on A's premises till rent fell due to A's landlord. The landlord distrained the goods. X paid the rent and then sued A for the amount paid as having been paid to his use. It was held that the facts gave X no right of action. "Having seized the goods under the bill of sale, they

(a) [Except in case of payment of bill of exchange, *supra*. See note a, page 197.]

were his absolute property. He had a right to take them away; indeed it was his duty to take them away. He probably left them on the premises for his own purposes, at all events *they were not left there at the request or for the benefit of the defendant.*" Marsden, L. R. 1 C. P. 529.

(3) There are a number of cases in which A may be called upon to repay to X money which has come into his possession under circumstances which disentitle him to retain it.

This class of cases, though at one time in the hands of Lord MANSFIELD it threatened to expand into the vagueness of "moral obligation," is practically reducible to two groups of circumstances now pretty clearly defined.

The first of these are cases of money obtained by wrong, of which payments under contracts induced by fraud, or duress, have afforded us some illustrations; the second are cases of money paid under such mistake of fact as creates a belief that a legal liability rests on the payer to make the payment.¹

*327 Marriott v. Hampton,
2 Sm. L. C. 356, and
notes thereto.

It would not fall within the limits of our subject to deal with cases of this nature.

¹ To these is sometimes added the liability arising to repay money paid upon a consideration which has wholly failed, but this it would seem is based upon genuine contract, the breach of which with its consequences was thus shortly stated in an *indictment*.

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APPENDIX B.

AGENCY.

*Agency is a
special
contract.*

It is hardly possible to avoid dealing with the subject of Agency in a work professing to treat of the general principles of the law of Contract, because the relations of Principal and Agent are involved in many of the cases used by way of illustration, and recur in almost every part of the subject. And yet Agency is, strictly speaking, a special contract, the details of which, like those of Bailment, Partnership, or Sale, are outside of the scope of this work.

Not a Status. The relation of Principal and Agent is introduced by writers of great authority into the subject of Parties to Contracts, but we avoid this course and for the following reason:

In dealing with parties to contracts it seems right to limit that branch of the subject to the Capacity of Parties as affected by *Status*, and not to introduce limitations or modifications of contracting power, which, as in the case of Agency, spring from contract.

For Agency is not a *Status*. The essential feature of a *status* is that the rights and liabilities affecting the class which constitutes each particular *status* are such as no member of the class can vary by contract¹.

¹ It is believed that this suggested characteristic of Status is its true *differentia* from other legal relations. At any rate it cannot be amiss to offer a suggestion which may help the student out of the difficulties which Austin's discussion of the subject of *status* tends to increase rather than to diminish.

while he remains a member of the class. An infant, for instance, can by no possibility contract himself out of the Infant's Relief Act, nor can a *329 soldier contract himself out of the Mutiny Act.

A corporation can by no artifice bind itself by a contract *ultra vires*, nor can a British subject make a valid promise to sell his vote at an election, to abstain from marriage, or to do any other act which is expressly unlawful or held to be contrary to public policy.

An agent, on the other hand, may by the terms of his contract vary indefinitely his rights and liabilities in respect of his principal and of the parties whom he brings into relations with his principal. Except in the case of some statutory regulations affecting agents of a certain class, the rules of law which affect Agency are either special rules which admit of variation by contract, or general rules as to the consequences which follow upon conduct or expressions of a certain sort.

For instance, it is a general rule of law that an agent standing between a foreign dealer and an English principal is personally liable to his English principal, but he may contract himself out of this rule and free himself from liability by express terms.

Similarly it is a general rule of law that if an agent contracts as a principal, or contracts for a principal whose name he does not disclose, the party with whom he contracts has an option to proceed against the agent or principal when he has discovered the true position of affairs: in like manner the principal has a right to intervene, and may if he choose take the benefit of the agent's contract. But here it is the conduct of the agent which has made him liable at the option of the third party and which leaves him liable at the option of his principal. In all this there is nothing of *Status*. The relations of principal and agent, of agent and third party, of principal and third party, all spring

Mahony v.
Kekuli, 14 C.
B. 898. [See
McKenzie v.
Nevins, 22
Me. 188.]

from contract, and may be modified by contract unless the conduct of one of the parties has been such as to furnish inference of intention which may not be rebutted.

*330 Agency then being a special sort of contract, we only touch upon its main characteristics in deference to the frequency with which it occurs in the general law of the subject. We may group what has to be said on the matter under the following heads:

(1) The mode of appointing an agent and the extent of authority conferred by different modes of appointment.

(2) The restriction and revocation of authority once given.

(3) The rights and liabilities which may arise as between agent, principal and third parties.

(1.)

An agent need not possess the capacity to contract in order to make a binding contract between his principal and a third party; but if he do not possess such capacity, he can acquire no personal rights or liabilities under the contract.

In order that an agent may make a binding contract under seal, it is necessary that he should receive his authority under seal. Such a formal authority is called a *power of attorney*.

[Gordon v. Bulkley, 14 S. & R. 831.]

In order that an agent may make a binding contract relating to leases and interests in land within the meaning of 29 Car. II. c. 3, ss. 1, 3, it is necessary that the agent should receive an authority in writing.

[Shaw v. Nudd, 8 Pick. 9.]

For all other purposes the form in which an agent receives his authority is immaterial: writing, words or conduct are all modes in which an authority may be conferred.

Nor is it necessary that the principal should have authorized the making of the contract before it was

entered into by the agent. He may assume its rights and liabilities by a subsequent ratification.

But in order that ratification may have this effect Ratification. the agent must have acted *as agent*, and *on behalf of* Wilson v. the principal who ratifies, so that there must be a Tumman, 6 principal in the contemplation of the agent, and the M. & G. 236. agent must assume to act for him. [Roby v. Cossitt, 78 Ill. 638.]

An extension is given to this power of rati- *331 Exceptions to general rule.

In a contract of marine insurance, persons "who are not named or ascertained at the time the policy is effected are allowed to come in and take the benefit of Per Erle, C. the insurance. But then they must be persons who J., in Watson v. Swann, 11 were contemplated at the time the policy was made." C. B. N. S. 789.

Again, in cases of representation by administrators of an intestate or trustees of a bankrupt, an act done by an agent on behalf of the estate may be ratified by the administrators or trustees when appointed, though they were unascertained persons at the time the act Foster v. Bates, 12 M. & W. 226.

Apart from the few cases in which Form or writing is necessary to give an authority, and apart from the rules relating to ratification, the mode in which the relation between principal and agent is created calls for no remark. It is more important to consider the nature of the agent's authority and the extent to which it may be modified by the fashion of its creation or by express restrictions.

An authority may be special, or it may be general. Special A special agent is given a prescribed and definite au- agency. thority for the purposes of a particular transaction. He can only bind his principal to the extent of the powers assigned to them.

Thus where a person, not being a dealer in horses, authorized his servant to sell a horse, it was held that he was not bound by a warranty of the horse given by

**Brady v.
Todd, 9 C. B.
N. S. 592.**

his servant to the purchaser: inasmuch as the servant had received no express authority to give a warranty, and was not habitually employed by his master to sell horses so as to confer upon him the powers of a general agent. (a)

**General
agency.**

A general agent has the full powers which the nature of his employment might reasonably be supposed to confer, and these cannot be limited by restrictions, imposed by his principal, but not communicated to the party dealing with him.

***332** For a general agent represents his principal throughout the various transactions incident to a particular sort of business which the agent is employed to carry on: while a special agent is agent, as it were, incidentally, and represents his principal for the occasion only.

**How it may
arise:**

A general agent may derive his authority from the fact that business of a certain sort is entrusted to him which involves the exercise of a discretion, or from the fact that he stands in some such relation to his principal as of itself implies an authority to act in certain matters, or from the fact that the principal has habitually sanctioned acts of a particular character done by the agent on his behalf.

**From the
giving dis-
cretionary
powers.**

The first of these forms of general agency, that which arises by entrusting to a man the conduct of

(a) [There are a number of cases which hold a doctrine contrary to that laid down in the text. See *Alexander v. Gibson*, 2 Campbell, 555; *Bradford v. Bush*, 10 Ala. 386; *Woodford v. McClenahan*, 4 Gilm. (Ill.) 85; *Hunter v. Jameson*, 6 Ired. L. (N. Car.) 252; *Franklin v. Ezell*, 1 Snead, (Tenn.) 497; *Nelson v. Cowing*, 6 Hill, (N. Y.) 336, and *Schuchhardt v. Allen*, 1 Wall. (U. S.) 359. Some of these cases turn upon the point that the presumption is in favor of the right to make the warranty, but others are in direct conflict with the case cited in the text. Upon the question of presumption see *Gibson v. Colt*, 7 Johns. (N. Y.) 390, and *Smith v. Tracey*, 86 N. Y. 79, which hold that there is no presumption of authority to warrant, unless it is where it is the usage of the trade to warrant.]

business which involves the exercise of discretion, is best illustrated by noting some of the commonest forms of professional or commercial agency.

(a) An auctioneer is an agent to sell goods at a Auctioneer. public auction. He is primarily an agent for the seller, but, upon the goods being knocked down, he becomes also the agent of the buyer; and he is so for the purpose of the signatures of both parties within the meaning of the 4th and 17th sections of the Statute of Frauds. He has not merely an authority to sell, but actual possession of the goods, and a lien upon them for his charges. He may sue the purchaser in his own name, and even where he contracts avowedly as agent, and for a known principal, he may introduce *Woolfe v. Horne, L. R. 2 Q. B. D. 355* terms into the contract which he makes with the buyer, so as to render himself personally liable.

(b) A factor is an agent employed to sell goods which Factor. are consigned to him by or on behalf of his principal: "he usually sells in his own name without disclosing that of his principal: the latter, therefore, with full knowledge of these circumstances, trusts him with the Per Abbott. actual possession of the goods and gives him authority C. J., Baring v. Corrie, 2 B. & Ald. 143. to sue in his own name." [Hearshey v. Hichox, 7 Eng. Ark. 125.]

The power of the factor to deal with the goods is not limited by the general discretion *383 as to sale; he has a lien upon the goods for his commission, and has a discretionary power to insure them.

(c) A commission agent is one who buys or sells Commission goods for a foreign principal. He deals directly and personally with both his employers, and establishes no contractual relation between them. "There is no more privity between the person supplying goods to the commission agent and the foreign correspondent than there is between the brickmaker who supplies brick to a person building a house and the owner of that house. The property in the bricks passes from the brickmaker

to the builder, and, when they are built into the wall, to the owner of that wall: and just so does the prop-

Per Blackburn, J., Ire-
land v. Livingston L. R. 5 H. L. 408.
erty in the goods pass from the country producer to the commission merchant, and then, when the goods are shipped from the commission merchant, to his consignee."

The commission agent in fact promises to find goods for his employer, on the best terms he can, on payment to him of a commission.

Broker. (d) A broker differs essentially from the kinds of agents we have described. A factor *may*, a commission agent *must*, contract in his own name; each has certain rights over the goods which are the subject of sale. But a broker is merely the means of establishing privity of contract between two parties; he has no dealings with the goods or their price and no right to sue in his own name.

Agency from relation of parties. The relations of the parties may confer upon one a general authority to act on behalf of the other.

Partnership. Thus a partner, acting within the ordinary limits of the partnership business, has authority to contract & W. 708. on behalf of the firm, that is to say the partners [Willes v. March, 30 N. jointly.

Y. 844.] Cohabitation. Thus also a man by marrying a woman, or cohabitating with her as his wife, gives her an implied authority to bind him by contract for such things as are suited to the position which she is allowed by him to occupy.

Agency from conduct of a general kind: if a man allow a servant constantly to purchase goods upon credit the master will be held liable though the servant purchase things for his own use. But these must be of the same class as those ordinarily purchased for the master.

Husband and wife. And so if a man entrust his wife with the management of a trade, or permit another habitually to trans-

act business for him of a certain sort, he will be bound [Fisher v. Campbell, 9 Porter, Ala. 210.] by acts done in pursuance of a continuous authority presumed from such a course of conduct.

(2.)

A special agent has, as we have seen, such authority as is expressly conferred upon him, and no more. A general agent has the authority incident to the scope of his business; he has such a power of binding his principal to third parties as a reasonable man, having regard to the character of the business, would naturally presume that he possessed.

And from this description of the nature of an agent's authority it follows that the principal cannot, by instructions addressed to the agent, restrict his authority in reference to third parties. If he place a man in such a position as invests him with an apparent authority to do certain acts, and then instructs him privately not to do them, he will nevertheless be bound if the agent disobey his instructions in contracting with a third party who is ignorant of them. See judgment of Byles, J., Maddick v. Marshall, 16 C. B. N. S. 387. [Fisher v. Campbell, 9 Porter, 210.]

Revocation of the agent's authority by the principal operates to determine the agency as between agent and principal so soon as the revocation is communicated to the agent; as between the principal and third parties so soon as the revocation is made known to them. Story on Agency, s. 470. But this last rule is apparently subject to an exception in the case of the implied authority springing from the relation of husband and wife, which may be revoked without notice to those with whom the wife deals. *335 Jolly v. Rees, 15 C. B. N. S. 628.

The death of the principal, the marriage of the principal, if a woman, or the bankruptcy of the principal, would, in all cases it should seem, operate as an absolute revocation of the agency, not only as between principal and agent, but as between principal and third parties. Blades v. Free, 9 B. & C. 167. Charnley v. Winstanley, 5 East, 266. Minett v. Forester, 4 Taunt. 541.

Delegation of authority. An agent may not as a rule depute another person to do that which he has undertaken to do.

The reason of this rule, and its limitations, are thus L.R. 8 Ch.D. stated by THESIGER, L.J., in *De Bussche v. Alt.* "As 810.

a general rule, no doubt, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this action when analyzed merely imports that an agent cannot, without authority from his principal, devolve upon another obligation to the principal which he has himself undertaken personally to fulfill; and that inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident to the contract." The Lord Justice then goes on to point out that there are occasions when such an authority must needs be implied, occasions springing from the conduct of the parties, the usage of a trade, the nature of a business, or an unforeseen emergency, "and that when such implied authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts on him, as if he had been appointed agent by the principal himself."

(3.)

The contract of agency as between agent and principal imports a liability on the part of the principal to indemnify the agent for acts done lawfully

¹ Smith, L.C., *336 in pursuance of his authority. It also imports notes to Coggs v. Bernard. a promise on the part of the agent to act with Adamson v. Jurvis, 4 Bing. 66. due diligence in the matter of the agency and within the limits of his authority. As regards the right arising from contracts made by the agent on behalf of his

principal with third parties, we will state only the most common and established rules.

(a) Where the contract is under seal, no one is regarded as a party to the contract who is not named as a party in the deed.

(b) Where the contract is in writing no one contracting as a party can be heard to say that he is not one, but other parties may be shown to exist. So where an agent contracts personally in the matter of Higgins v. Senior, 8 M. & W. 834. contracted to fix him with the contract, or to show that Trueman v. Loder, 11 Ad. & E. 537. he merely represented his principal and to sue the principal. (a)

(c) Where the agent contracts *as agent* for a principal whom he does not name he binds himself personally, or his principal when disclosed, at the option of the party with whom he contracts.

But this general rule must be taken to be subject to the usage of the trade in which the agent is employed and the character of the agency, for the contract may be of such a nature that though the agent does not disclose his principal's name, he excludes himself from liability upon the contract. Such is the case of a broker acting for buyer and seller, who delivers to the seller a note in terms "*sold for you to my principal*" and signs it *as broker*. In such a case it has been held that the broker is by the terms of the contract excluded from liability to the seller, though he would have been liable had the terms run "*bought of you for my principal*". Southwell v. Bowditch, L. R. 1 C. P. D. 374. Fleet v. Murton, L. R. 5 Q. B. 181.

(d) If the agent contracts as principal, that is to say, if there be not merely a non-disclosure of the name of the principal, but a non-disclosure of the existence of the principal, the agent is *a fortiori* liable at the option of the party with whom he contracts.

(a) [See note (a,) page 49.]
351

Rights of parties where existence of principal is undisclosed.

*337 In this case and in the case above mentioned the rights of the parties appear to be these.

The agent is liable at the option of the third party with whom he has contracted, and his principal is not bound to intervene if the third party choose to hold the agent liable when he is aware of the circumstances of the case.

2 Smith, L. C., p. 379, notes to Thompson v. Davenport.

The principal is entitled to intervene and, as against his agent, take the benefit of the contract.

The third party, upon the disclosure of the principal, may elect whether he will adopt agent or principal as the party with whom he has contracted. He is thenceforth bound by such election.

But in each of these last cases the rights of the parties are limited by circumstances which may make it inequitable that the principal or the third party should deal with one another as though each had been disclosed to the other from the first.

Per Willes, J., Dresser v. Norwood, 14 C.B.N.S. 574. Armstrong v. Stokes, L.R. 7 Q.B. 608. Where idea of agency excluded. Humble v. Hunter, 12 Q.B. 810. Where no authority given.

If the principal choose to enforce the contract, he must do so subject to the right of the third party to be put in the same position as if he had been dealing with the real principal." Any rights which the third party would have had against the agent in respect of the contract he has against the principal. And in like manner the third party in enforcing the contract against the principal when discovered must do so subject to the state of accounts between the agent and principal.

(e) It is possible for an agent to enter into a contract in which he so represents himself as principal that the idea of agency is altogether excluded. Thus, where an agent in making a charter party described himself therein as owner of the ship, it was held that the principal could not sue upon the contract.

(f) If a man contract as agent for an existing principal, having no authority to do so, he cannot be sued upon the contract so made, or dealt with as though he

were the principal, because there is in point of fact no relation of principal and agent, but only a false representation by one party to another that he *338 *Lewis v. Nicholson*,
is acting as an agent and can bring about a 18 Q. B. 508.
contract between that other person and the supposed [Hancock v.
principal. Yunker,
88 Ill. 208.]

But in order to find a remedy *ex contractu* for the person to whom such a representation has been made, a warranty of authority, or promise that he was an agent, is feigned to have been given by the one party to the other. Such a promise or warranty need never have been, and in the nature of things probably never was present to the minds of parties to the contract; nevertheless it appears to have been thought to be a reasonable implication from the conduct of the parties by the Court of Exchequer Chamber, in *Collen v. 8 E. & B. 647.* *Wright*, the leading case upon the subject. The novelty as well as the unreality of the conception formed the ground of a luminous dissenting judgment by At p. 658. COCKBURN, C. J. The point has been already alluded to in the discussion of the nature of Warranty, and in See ante, particular of implied warranties. (a) p. 295, note.

(g) If a man contract as agent for a non-existent Where no principal he is personally liable on the contract; he exists. cannot be relieved from liability by any subsequent ratification, for the reason, assigned above, that such persons only can ratify as were ascertained or contemplated when the contract was made. A purchased goods on behalf of a company not in existence at the time. The company was incorporated, it collapsed, and A was sued on the contract. He was held personally liable. "Both upon principle and authority," said WILLES, J., "it seems to me that the company never could be liable upon this contract, and construing this

(a) [See *Ballou v. Talbot*, 16 Mass. 461; *Harper v. Little*, 2 Greenl. 14; *McHenry v. Duffield*, 7 Blackf. 41; *Hancock v. Yunker*, 88 Ill. 208, which hold that an action on the case is the proper remedy.]

Kelner v. document *ut res magis valeat quam pereat*, we must
Baxter, L. R. assume that the parties contemplated that the persons
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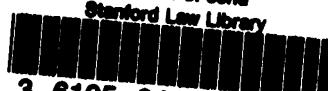
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